No. 83-810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE:

NATHAN YORKE, TRUSTEE IN BANKRUPTCY,
THE SEEBURG CORPORATION

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

WAREHOUSE, MAIL ORDER, OFFICE, PROFESSIONAL AND TECHNICAL EMPLOYEES UNION LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervening-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may override the claims and priority requirements of the Bankruptcy Code in favor of ex-employees at the expense of the estate's creditors?

2. May any remedy be predicated on an unfair labor practice neither charged, litigated or found by the Board?

3. May the Board order a "back pay" remedy where admittedly the employees who are the beneficiaries of the Board's largesse have been rightfully terminated?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 709 F. 2d 1138. A copy of the opinion is made a part of the Appendix. (A 70-94). The decision and order of the National Labor Relations Board is reported at 259 NLRB N. 105 (Dec. 28, 1981).

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1983. The decision of the Court of Appeals, denying petitioner's timely petition for rehearing with suggestions for rehearing en banc, was entered on August 26, 1983 and is unreported. A copy of the decision is made a part of the Appendix (A 95).

STATUTES AND RULES INVOLVED

Section 1104(a)(1) of the Bankruptcy Code, 11 U.S.C. 1104(a)(1); Section 501 of the Bankruptcy Code, 11 U.S.C. 501, Section 502 of the Bankruptcy Code, 11 U.S.C. 502; Section 507 of the Bankruptcy Code, 11 U.S.C. 507, Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5); Section 9(a) of the National Labor Relations Act, 29 U.S.C. 159(a); Section 554 of the Administrative Procedures Act, 5 U.S.C. 554, Section 557(c)(A) of the Administrative Procedures Act, 5 U.S.C. 557(c)(A) are all set forth in the Appendix hereto.

STATEMENT OF THE CASE

A. BANKRUPTCY PROCEEDINGS

This is a case of first impression involving two vitally important, though conflicting, national policies: the revitalization of financially troubled business enterprises and the regulation of labor-management relations through collective bargaining.

The case centers on the problems of a Trustee in bankruptcy appointed in the aftermath of operations by a debtor in possession under Chapter 11 under the then new Bankruptcy Code ("Code). The Trustee was appointed pursuant to Section 1104(a)(1) of the Code as the result of the fraud and mismanagment of the debtor in possession. (A 97). At the

time of his appointment the work force had declined to seven and funds were unavailable to pay them. The Trustee sought and obtained permission from the Bankruptcy Court to close the operation and did so immediately. Afterwards, he received a communication from the Union requesting information and a meeting. The Trustee promptly responded by letter to the Union's letter, furnished information that the operation had been closed, and expressed willingness to furnish further information.

The Union, without responding to the Trustee's letter, filed unfair labor practice charges almost immediately and the Board issued a complaint charging that the Trustee on February 11, 1980, terminated operations without prior notice to the Union and without having afforded the Union an opportunity to negotiate.

The National Labor Relations Board filed a claim in the bankruptcy proceedings on behalf of the employees whose employment was terminated at the plant's closing in the amount of $142,000.00. Later, the Board reduced this claim to $55,000.00. This amount was sequestered to meet any potential liability arising from the claim and, thereafter, a plan of liquidation was approved by the Bankruptcy Court. The Bankruptcy Court ordered the unfair labor practice proceedings stayed and announced that it would decide the charges involved in those proceedings. (A 56-63).

The Board successfully appealed this order to the District Court, asserting the exclusive jurisdiction of the Board to hear and determine unfair labor practice charges. The District Court ruled in its favor. (A 65-68). The hearing on the unfair labor practice charge proceeded before an Administrative Law Judge.

B. BOARD PROCEEDINGS

At the hearing, the literal truth, although not the illegality, of the charge of the amended complaint was conceded, i.e., that the Trustee had closed the plant without prior notice to the

Union and without giving an opportunity to bargain on the effects of the closure. Evidence of what transpired in the aftermath of the closure was to go only to the remedy.

The Administrative Law Judge found that the failure to give prior notice and an opportunity to bargain as alleged in the Board's complaint constituted a violation of Section 8(a)(5) of the National Labor Relations Act but refused any back pay remedy. (A 17-40). The Board upheld the finding of illegality and granted a *Transmarine* remedy, requiring payment of funds from the estate. (A 41-50).

The *Transmarine* remedy is that announced by the Board in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). Essentially, the remedy as applied here requires the Trustee to pay a minimum two weeks "back pay" to the employees terminated on the plant's closing and bargain with the Union. The "back pay" will continue to accumulate beyond the minimum two week period until agreement or impasse is reached on a "collective bargaining agreement."

C. COURT OF APPEALS PROCEEDINGS

The Court of Appeals reversed the only finding of an unfair labor practice made by the Board. The Court concluded that the emergency circumstances faced by the Trustee and the authorization of the bankruptcy court justified the Trustee in terminating the operation without notice to the Union and without affording the opportunity to bargain. Fulfilling the law of Murphy's prophecy, the Court went on to find an unfair labor practice which was not charged, i.e., that, in the *aftermath of the closing*, the Trustee failed to bargain. On this non-existent charge and finding, the Court permitted the remedy of the Board to stand. (A 84).

REASONS FOR GRANTING THE WRIT

"This case raises vitally important questions concerning the relative jurisdictional roles of the bankruptcy court and the NLRB in the context of Chapter XI bankruptcy proceed-

ing, questions of critical importance not only to the respective tribunals but to future litigants as well as the entire bench and bar. The majority's rote and mechanistic application of principles that may be appropriate in the normal employer-employee relationship ignores the fact that this case arises in the context of a Federal Bankruptcy Chapter XI proceeding. Furthermore, the majority fails to respect the severe limitations imposed on the authority of Chapter XI Bankruptcy Trustees, thus encroaching on the Bankruptcy Court's exclusive jurisdiction over Chapter XI bankruptcy proceedings. In failing to adequately consider the limited powers of a Trustee in bankruptcy, the majority's decision undermines Congress's goal in enacting Chapter XI of the Federal Bankruptcy Act, that of preserving the viability of financially troubled business entities whenever possible. See, *In re Huntington, Ltd.*, 654 F. 2d 578 (9th Cir. 1981). The majority's decision makes virtually impossible the Trustee's 'thankless task of determining who should share the losses incurred by an unsuccessful business and how the values of the estate should be apportioned among creditors....' S. Rep. No. 95-989 (95th Cong. 2nd Sess. 10 *reprinted in* 1978 U.S. Code Cong. & Ad. News, 5787, 5796) and, furthermore violates Congress's purpose, expressed in the National Labor Relations Act, of achieving industrial harmony and prosperity by 'recognizing! the rights of all interested parties in labor relations...being! scrupulously fair to each—the employer, the employees, and the public.' H.R. Rep. No. 245, 80th Cong. lst Sess. (1947) *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 295." (A 85-86).

From Judge Coffey's dissent in the Court of Appeals.

This case is another case in which the National Labor Relations Board displayed its indifference to or disregard of the policies and requirements of Federal bankruptcy policies and statutory requirements.[1] It is a case of first impression in determining whether a Trustee in bankruptcy may be required

[1] *In re Bildisco*, 682 F. 2d 72, at 874 (3d Cir. 1982) cert. granted, 74 L. Ed. 992.

to bargain to agreement and pay ex-employees for work not done as a priority claim unprovided for in the claim structure of the Bankruptcy Code, Title 11 U.S.C. 501, 502, 507; it is a case of first impression in the Board's determination that the Trustee is required to pay a minimum "back pay" to ex-employees whose status as ex-employees is permanent. The case is similar to *NLRB v. Sure-Tan, Inc.*, 672 F. 2d 592, rehearing denied, 677 F. 2d 584 (7th Cir. 1982), on which this Court granted certiorari, March 7, 1983, Docket No. 82-945, where the Board's disregard of the "tension between labor and immigration policies." 677 F. 2d 585, called forth an anguished dissent as well as this Court's grant of certiorari.

The majority in the Court of Appeals saw the case as one where the bone of contention is whether or not a Trustee is bound by the labor laws. The dissenter correctly saw the case as one where the Trustee is bound by both the labor and bankruptcy laws with the bankruptcy laws paramount as to the expenditure of estate funds. The Court's holding is counter to the effect, if not the legal principle of *Railway Labor Executives Assn. v. Gibbons*, 455 U.S. 457, 71 L. Ed. 2d 335, 102 S.Ct. 1169, reh. den. 72 L. Ed. 2d 459, 102 S.Ct. 1997 (1981), where an attempt to legislate compensation for ex-employees at the expense of the bankrupt estate was held by the District Court to violate the Fifth Amendment's prohibition against taking of property without compensation.

The case also presents a due process problem because of the Court of Appeals disregard of the absence of pleading or findings by the Board on the unfair labor practice which the Court, not the Board, found the Trustee guilty of and for which the Court approved a remedy. The Court absolved the Trustee of guilt in the practices complained of in the Board's complaint and yet found, on its own hook, that the Trustee was guilty of a failure to bargain in the aftermath of the Court approved closure.

Finally, this Court has never passed on the Board's so-called *Transmarine* remedy.[2] An after-the-fact payment is not "back pay" which the Board may require as a remedy for unfair labor practices, but is by design, a penalty for past failures. Even as a penalty for failure to give adequate notice, the remedy is suspect. Where the failure of the Trustee to give notice is excused, as it was here, then no imbalance to redress could exist and the penalty is simply a club to insure submission to a Union's demands, interdicted by this Court long ago in *Republic Steel Company v. NLRB*, 311 U.S. 7 (1940).

I.

THE COURT AND THE BOARD HAVE DECIDED THAT, IF THE TRUSTEE CANNOT SERVE TWO MASTERS, THE ONE SERVED WILL BE THE LABOR BOARD

Deference to the policies of the Labor Management Relations Act and to the expertise of the National Labor Relations Board should not also include a blindness to the policies of the bankruptcy laws and to the rule of the courts and its officers under those laws. What this case involves is the Board's determination that the Trustee must yield his duties under the Bankruptcy Laws and bargain and grant to ex-employees the $55,000 in funds which remain in the estate.

As emphasized in Judge Coffey's dissent:

> "To facilitate the goals of Chapter XI, Congress has vested the bankruptcy court with exclusive jurisdiction over the entire Chapter XI bankruptcy proceedings, and has dele-

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[2] After the Board decision in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as noted in the Court of Appeals decision in that case, 380 F. 2d 933, an attempt was made to conceal from the union information as to the closing there involved; a *status quo ante* remedy appropriate to such duplicity is grossly inappropriate where the Board found the Trustee did not know of the Union and, as found by the Court, did nothing illegal in closing down the operation pursuant to Court order.

gated extremely limited authority to the Trustee to administer the debtor's estate. The Chapter XI Trustee, an officer of the bankruptcy Court, derives his authority exclusively from the Bankruptcy Act, and his power to act independently of the bankruptcy court is extremely circumscribed." (A 86)

To state that a liquidation trustee is also subject to the labor law is also certainly true so far as it goes. But a liquidating trustee's function is to preserve the estate for the benefit of creditors. He is not to play the role of Lady Bountiful at the expense of creditors or for the benefit of anyone but those creditors. His role is not to continue operations except as an aid to liquidating the estate. Judge Coffey's dissent accurately portrays the Trustee as the central figure and the Bankruptcy Code as the script in any scenario concerning the bankruptcy estate *after* the closing of the plant. (A 93).

Judge Coffey suggests that an accomodation of the respective jurisdictions would be accomplished by obtaining a go ahead from the bankruptcy court for the trustee to negotiate with the unions. Such a go ahead would necessarily involve the disclosure of the potential areas of bargaining and a determination as to the presence or absence of limitations on the scope of the bargaining. (A 92).

Judge Coffey further stated:

"If the Bankruptcy Court refused to allow the Trustee to bargain, or if the Trustee subsequently failed to bargain in good faith, *then, and only then,* should the Union be permitted to bring an unfair labor practice charge before the NLRB. Undue encroachment by the NLRB in the Bankruptcy Court's exclusive jurisdictional sphere would be avoided, or at least minimized, by affording the Bankruptcy Court an opportunity to act within their proper realm *before* instituting an unfair labor practice proceeding with the NLRB. The course of action adopted by the Union and the NLRB in this case, on the other hand, fails to respect the authority of the Bankruptcy Court and the

> severe limitations on a bankruptcy Trustee's powers. In sanctioning the Union's actions, the majority's decision will inevitably lead to jurisdictional conflicts between two separate federal tribunals, the Bankruptcy Court and the NLRB." (Emphasis by Judge Coffey) (A 92)

In the present case, it would appear that a proper limitation limitation would insure that no assets of the estate would be sacrificed at the expense of the creditors of the estate without a real consideration. This case is about the $55,000 held in the bankruptcy court. There is no right or duty of the Trustee to deliver this into the Board's hands. The conflict between the Board's demands and the trustee's duty should be resolved in the first instance in the Bankruptcy Court. Judge Coffey quoted from *In re Brada Miller Freight System,* 702 F. 2d 890, 897 (11th Cir. 1983) as follows:

> "We do not contemplate that Congress intended the ultimate fate of a corporation under Chapter XI to rest so largely in the hands of the company's protected employees. There simply exist too many other critical interests, those of other employees, creditors, and shareholders, the protection of which provides the stimulus for the bankruptcy laws, for this Court to conclude that the collective bargaining agreement was meant to hold a stranglehold position ...." (A 93)

Judge Coffey went on here:

> "I dissent as I believe the majority's decision foists an unreasonable burden on business enterprises involved in Chapter 11 bankruptcy proceedings. It is the height of absurdity for the NLRB to exert a fatal chokehold on Congress's specific intent to allow mortally wounded businesses a chance to make a financial comeback at a time when our basic industries are struggling to survive. Courts not only have the obligation to interpret and apply the law, but must also continue to be aware of economic reality while showing fiscal responsibility in their decisions and must not decide cases in an economic vacuum." (A 93-94)

II.

THE FUNDAMENTAL RIGHT TO NOTICE WAS VIOLATED BY THE COURT'S INDEPENDENT FINDING OF AN UNFAIR LABOR PRACTICE NEITHER ALLEGED IN THE BOARD COMPLAINT NOR FOUND BY THE BOARD

Due process in the context of the unfair labor practice case is that required by statute and rule. The argument in the Court of Appeals centered *only* on the unfair labor practice alleged and found. On the petition for rehearing, the Trustee pointed out, that he had been found by the Court to have committed an unfair labor practice neither charged, found nor litigated. The amended complaint pertinently states:

> **XI**
>
> "(a) On or about February 8, 1980, Respondents terminated operations at its facility in Chicago, Illinois and discharged its employees.
>
> (b) Respondents engaged in the acts and conduct described above in paragraph XI(a) without prior notice to the Union and without having offered the Union an opportunity to negotiate or bargain concerning the effect of such conduct."
>
> **XII**
>
> (a) By the acts and conduct described above in Paragraph XI, and by each of said acts, Respondents both individually and collectively as Respondents have failed and refused, and are failing and refusing, to bargain collectively with the representative of its employers, and Respondents thereby have been engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act." (A 6).

At the Board hearing, counsel for the Trustee conceded that the Trustee had failed to give prior notice and an opportunity to bargain prior to closing the plant pursuant to the order of the Court.[3] Counsel was advised by the Administrative Law Judge that subsequent events "though perhaps it would not negate the existence of an unfair labor practice previously, might affect whether a remedy is appropriate." On his petition for rehearing in the Court of Appeals, the trustee emphasized that the Court had found an unfair labor practice that the Board had not found. The Board in its response to the Court seriously misled the Court as to the Administrative Law Judge's findings.

The Board assured the Court that the Administrative Law Judge "specifically found that 'Yorke failed to bargain with the Union about the shutdown's effects on employees even after it found out about the shutdown,**.'" This quote is part of her "analysis and conclusions,"[4] but Board counsel failed to inform the Court that the Administrative Law Judge in her conclusions of law did not find this to be violative of the Act. Tracking the allegations of the amended complaint, supra she concluded:

> "10. On February 11, 1980, The Seeburg Corporation, Seeburg Service Parts, and Yorke terminated operations at the Chicago, Illinois, facility, and discharged the employees at that facility, *without prior notice* to the Union and without having afforded the Union an opportunity to negotiate and bargain concerning the effects of such conduct on unit employees.
>
> 11. By engaging in the *conduct described in conclusion* of law 10, The Seeburg Corporation, Seeburg Service Parts, and Yorke engaged in unfair labor practices within

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[3] The Administrative Procedure Act, Title 5 U.S.C.A. § 554 requires that a party to a complaint be "timely informed" of the matters of fact and law asserted; decisions of the administrative agency, pursuant to § 557(c)(A), must include findings and conclusions of all *material issues.*

[4] She also "found" that bargaining did go on in August of 1980 (A 31) although it did not lead to anything.

> the meaning of Section 8(a)(5) and (1) of the Act, which unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act." (Emphasis supplied) (A 35).

These were her findings and conclusions. She did not go beyond the Amended Complaint. The Board in its Decision simply echoed her in this respect:

> "The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(5) and (1) of the Act by terminating its operations at its Chicago, Illinois, facility without prior notice to the Union and without affording it an opportunity to bargain with Respondent concerning the effects of such conduct on unit employees." (A 42).

The Court of Appeals refused to follow this finding as an unfair labor practice. The Court, notwithstanding the record, has found another and distinct failure to bargain in the "aftermath" of the closing.

The Court had neither the duty nor the right to search the record and determine whether or not the Trustee might have been charged with other transgressions and might have been found guilty if other charges had been made. As it stands, the Trustee (and more importantly the creditors of the estate) is being held responsible for matters with which he was not charged and as to which the Board found no violation of the Act.

The evidence in the record as to the circumstances under which the Trustee acted was offered, not to dispute the unfair labor practices charge which, *as charged,* was admitted but as an ameliorative to any remedy. It is an anomaly that the evidence, which includes evidence that the Trustee did bargain is now used as a basis for a further finding that the Trustee did not bargain and used as a justification for a penal remedy.

"(A) remedial order based on an erroneous finding of unfair labor practices cannot stand" *NLRB v. Downtown Bakery Corp.* 330 F. 2d 921, 928 (8th Cir. 1964).

The resultant effect of all this is set at naught the "due process" requirement of the Administrative Procedures Act, 5 U.S.C.A. 554, 557(c)(A) and the Board's own rules.

The Court's action here creates a direct conflict on the holding in *NLRB v. Blake Construction Co., Inc.*, 663 F. 2d 272 (D.C. Cir. 1981) that the procedural requirements of the Administrative Procedures Act and, the Board's own rules set the procedural "due process" standards as a matter of "fundamental fairness."

III.

THE TRANSMARINE REMEDY, IN THE CIRCUMSTANCES OF THIS CASE, IS EITHER PENAL OR AN ATTEMPT TO FIX A CONTRACT TERM

In the original *Transmarine* decision, the Board professed to be guided by the principle that the wrongdoer rather than the victim should bear the consequences of unlawful conduct and the remedy should be adopted to the situation that calls for redress. Here, of course, there were no "victims" for the right to terminate their employment without prior notice and opportunity to bargain and in accordance with the Bankruptcy Court's order has been vindicated. The situation being "remedied" is a post closing situation where the Trustee has only limited powers and not the power to pay "back pay" or even "severance pay." See *In re Ad Service Engravings Co.*, 338 F. 2d 41 (6th Cir. 1967). Terms and conditions of employment, the normal bargaining grist, closing, were a thing of the past.

Section 8(a)(5) of the Act requires an "employer" which the Trustee was not, after the closing, to bargain collectively with the representatives of his employees, subject to the provision of Section 9(a) of the Act. Section 9(a) describes the representation as "for the purposes of collective bargaining in respect to rates of pay, wages, hours, of employment or other conditions of employment." Unless "condition of employment"

is a phrase of infinite elasticity, it must snap at attempting to encompass ex-employees of a closed, bankrupt company. Against the contrast of the deceit in failing to notify the Union in *Transmarine*, the Board here found the Trustee lacked knowledge of the existence of the Union, yet in Procrustian fashion adjusted the remedy to the present circumstances well beyond the rationale for its creation. The absence of any knavery here condemns the application of the remedy here as "penal" under this Court's holding in *Republic Steel Company v. NLRB*, 311 U.S. 7 (1940).

The order superimposes on bargaining a "back pay" requirement that has nothing at all to do with "back pay." The label is attached simply because 10 of the Act provides that the Board may require "back pay" in its remedial orders; but calling the payment "back pay" here is nonsense. Here the Board orders payment measured by what could have been earned with no relationship to reality. The order, particularly in those aspects which pyramid the payment to the exhaustion of the $55,000 with no incentives to hold short of that figure, has the effect of dictating the terms of any putative agreement. This the Board may not do. See *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 96 L. Ed. 1027, 72 S.Ct. 824 (1952).

CONCLUSION

The words of Judge Wood, dissenting from the 7th Circuit's unwillingness to reconsider its decision in *Sure-Tan, supra.*, are apt to this case also.

> "The NLRB seems to use only its private knothole to view these issues and sees nothing except its own labor goals. I think this Court instead of peering through the NLRB's knothole should look over the fence for a better understanding of the whole problem." 677 F. 2d 585.

The Seventh Circuit has been led into sharing the Board's distorted vision by less than clear sight of the necessities of due process and the limitations on the Board's remedial powers.

As Judge Coffey observed:

> "As a case of first impression, this court's decision will have a direct impact on the resolution of future cases pertaining to the scope of a Chapter XI bankruptcy Trustee's duty to bargain with the bankrupt corporation's unionized employees. Therefore, I believe it is essential for this court to achieve an equitable balance between the goals of revitalizing financially troubled corporations and encouraging harmonious labor relations, a balance which will not frustrate the financial recovery of corporations involved in Chapter XI bankruptcy proceedings. I believe the majority opinion in this case fails to achieve this equitable balance, and rather takes a myopic and short-sighted view of the critical interests involved in Chapter XI bankruptcy proceedings." (A 93)

For all the foregoing reasons, certiorari should be granted with respect to each of the questions for which it is sought.

Respectfully submitted,

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APPENDIX

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UNITED STATES OF AMERICA
Before The National Labor Relations Board
Region 13

NATHAN YORKE, Trustee in Bankruptcy, Successor in Bankruptcy or Alter Ego to the SEEBURG CORPORATION AND SEEBURG SERVICE PARTS CO., A Single Employer

and

Case 13-CA-19631

LOCAL UNION 743, WAREHOUSE, MAIL ORDER, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

AMENDED COMPLAINT AND NOTICE OF HEARING

It having been charged by Local Union 743, Warehouse, Mail Order, Technical and Professional Employees Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union) that Nathan Yorke, Trustee in Bankruptcy, (herein called Respondent Yorke); The Seeburg Corporation (herein called Respondent Seeburg) and Seeburg Service Parts Co. (herein called Respondent Seeburg Service) (herein jointly called Respondents), have engaged in, and are engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, *et seq.* (herein called the Act), and

Complaint and Notice of Hearing having hereto issued on June 17, 1980 the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board (herein called the Board), by the undersigned Regional Director for Region 13, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Amended Complaint and Notice of Hearing and alleges as follows:

I

(a) The Charge herein was filed by the Union on February 28, 1980, and was served on, Respondent Seeburg, Respondent Yorke, by registered mail, on March 4, 1980.

(b) The first amended charge herein was filed by the Union on June 6, 1980, and was served on, Respondent Seeburg, Respondent Yorke, and Respondent Seeburg Service, by registered mail, on June 12, 1980.

(c) The second amended charge herein was filed by the Union on June 12, 1980, and was served on Respondents, by registered mail, on June 16, 1980.

II

(a) At all times material herein, until February 8, 1980, Respondent Seeburg, a Delaware Corporation, with an office and place of business in Chicago, Illinois, has been engaged in the manufacture of jukeboxes and other machinery.

(b) During the past calendar year, a representative period, Respondent Seeburg, in the course and conduct of its business operation described above in paragraph II(c), sold and shipped goods and materials valued in excess of $50,000 directly to points located outside the State of Illinois.

(c) At all times material herein, Respondent Seeburg Service, a Delaware Corporation, with an office and place of business located in Chicago, Illinois, has been engaged in the manufacture and/or distribution of parts.

(d) During the past calendar year, a representative period, Respondent Seeburg Service, in the course and conduct of its business operations described above in paragraph II(i), sold and shipped goods and services valued in excess of $50,000 directly to points located outside the State of Illinois.

(e) During the past calendar year, a representative period, Respondents, in the course and conduct of its business operations described above in paragraph II, collectively sold and shipped goods and provided services valued in excess of $50,000 directly to points located outside the State of Illinois.

III

(a) At all times material herein, Respondent Seeburg, and Respondent Seeburg Service have been affiliated business enterprises with common officers, ownership, directors, management, and supervisions; have formulated and administered a common labor policy affecting employees of said operations; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise.

(b) by virtue of its operations described above in paragraph III(a), Respondents constitute a single integrated business enterprise and single and/or joint employer within the meaning of the Act.

IV

(a) Since on or about February 4, 1980, and continuing to date, Respondent Yorke has been duly designated trustee in bankruptcy with full authority to continue operations and exercise all powers necessary to the Administration of the business of Respondent Seeburg and Respondent Seeburg Service.

(b) by virtue of the events described above in paragraph IV(a), Respondent Yorke is and has been at all times material herein a successor in bankruptcy of Respondent Seeburg and Respondent Seeburg Service.

(c) By virtue of the acts and conduct described above in paragraph IV(a), Respondent Yorke and Respondent Seeburg and Respondent Seeburg Service are, and have been at all times material herein, *alter egos* within the meaning of the Act.

V

(a) Respondent Seeburg, Respondent Yorke, and Respondent Seeburg Service each is now, and each has been at all times material herein, an employer engaged in commerce within the meaning of Section (2), (6) and (7) of the Act.

(b) Respondents collectively are now, and have been at all times material herein, an employer engaged in commerce within the meaning of Section (2), (6) and (7) of the Act.

VI

The Union is now and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

VII

At all times material herein, the following named persons occupied the positions set forth opposite their respective names, and are now, and have been at all times material herein, supervisors of Respondents within the meaning of Section 2(11) of the Act and agents of Respondents within the meaning of Section 2(13) of the Act:

Joseph Dillon	—	Chairman of the Board of Respondent Seeburg
James Nardini	—	Vice President for Industrial Relations of Respondent Seeburg

VIII

The following employees of Respondents and/or Respondent Yorke, alter ego or successor in bankruptcy to Respondent Seeburg and Respondent Seeburg Service constitute a union appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All plant clerical, and all production and maintenance employees at the Chicago, Illinois Plant, excluding executive, supervisory employees, timekeepers, foremen with power to hire and fire or to effectively recommend such action, office clerical employees, guards and professional employees as defined in the Act.

IX

Since in or about 1967, and at all times material herein, the Union has been the designated exclusive collective bargaining representative of the employees in the unit described above in paragraph VIII, and since said date the Union has been recognized as such representative. Such recognition has been

embodied in successive collective bargaining agreements, the most recent of which is effective by its terms for the period October 1, 1977 to September 29, 1980.

X

At all times since in or about 1967, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit described above in paragraph VIII, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

XI

(a) On or about February 8, 1980, Respondents terminated operations at its facility in Chicago, Illinois and discharged its employees.

(b) Respondents engaged in the acts and conduct described above in paragraph XI(a) without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain concerning the effect of said conduct.

XII

(a) By the acts and conduct described above in paragraph XI, and by each of said acts, Respondents both individually and collectively as Respondents have failed and refused, and are failing and refusing, to bargain collectively with the representative of its employees, and Respondents thereby have been engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 17th day of February, 1981, at 11 a.m. in Room 881, 219 South Dearborn, Everett McKinley Dirksen Building, Chicago, Illinois 60604, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned Regional Director, acting in this matter as an agent of the National Labor Relations Board, an original and four copies of an Answer to said Complaint within 10 days from the service thereof, and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

DATED at Chicago, Illinois, this 28th day of November, 1980.

/s/ MARTIN H. SCHNEID
Martin H. Schneid,
Acting Regional Director
National Labor Relations Board
Region 13
Everett McKinley Dirksen Building
219 S. Dearborn Street, Room 881
Chicago, Illinois 60604

(C Cases)

SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

The hearing will be conducted by an Administrative Law Judge of the National Labor Relations Board who will preside at the hearing as an independent, impartial trier of the facts and the law whose decision in due time will be served on the parties. The offices of the Administrative Law Judges are located in Washington, D. C., and San Francisco, California.

At the date, hour, and place for which the hearing is set, the Administrative Law Judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to assure that the issues are sharp and clearcut; or the Administrative Law Judge may independently conduct such a conference. The Administrative Law Judge will preside at such conference, but may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the Administrative Law Judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the Administrative Law Judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the Administrative Law Judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the Administrative Law Judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Administrative Law Judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the Administrative Law Judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the Administrative Law Judge before the close of hearing. In the event such copy is not submitted, and the filing thereof has not for good reason

shown been waived by the Administrative Law Judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. In the absence of a request, the Administrative Law Judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

Any party shall be entitled, upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, with the Administrative Law Judge who will fix the time for such filing.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations, Series 8, as amended, with respect to the procedure to be followed before the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the Administrative Law Judge will be considered unless received by the Chief Administrative Law Judge in Washington, D.C., *(or, in cases under the San Francisco, California, branch office of Administrative Law Judges, the Deputy Chief Administrative Law Judge in charge of such office)* at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously on all other parties, and proof of such service furnished to the Chief Administrative Law Judge or Deputy Chief Administrative Law Judge, as the case may be. All briefs or proposed findings filed with the Administrative Law Judge must be submitted in triplicate, and may be in typewritten, printed, or mimeographed form, with service on the other parties.

In due course the Administrative Law Judge will prepare and file with the Board a decision in this proceeding, and will cause a copy thereof to be served on each of the parties. Upon filing of this decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, on all parties. At that point, the Administrative Law Judge's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the Administrative Law Judge's decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be served on the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the Act reduce government expenditures and promote amity in labor relations. If adjustment appears possible, the Administrative Law Judge may suggest discussions between the parties or, upon request, will afford reasonable opportunity during the hearing for such discussions.

UNITED STATES OF AMERICA
Before the National Labor Relations Board
Region 13

NATHAN YORKE, Trustee in Bankruptcy of THE SEEBURG CORPORATION, et al

and

Case 13-CA-19631

LOCAL UNION 743, WAREHOUSE, MAIL ORDER, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ANSWER TO AMENDED-COMPLAINT

Now comes The Seeburg Corporation ("Seeburg") and Nathan Yorke, Trustee in Bankruptcy of Seeburg ("Yorke"), by their attorneys, and answer the Amended Complaint of the National Labor Relations Board as follows:

I

(a)-(c). Said Respondents admit that the charge described in Paragraph I(a), the first amended charge described in Paragraph I(b), and the second amended charge described in Paragraph I(c) were all filed by the Union and served upon Respondent, Yorke, on or about the dates alleged in Paragraph I. Said Respondents deny that the charge described in Paragraph I(b) were served upon the Respondent, Seeburg. Said

Respondents admit that the second amended charge described in Paragraph I(c) was served upon the Respondent, Seeburg. Said Respondents affirmatively allege that no charge has been filed by the Union at any time charging the Respondent, Seeburg.

II

Said Respondents deny the allegations of Paragraphs II(a), (b), (c), (d) and (e).

III

Said Respondents deny each and every allegation of Paragraphs III(a) and (b).

IV

Said Respondents admit that on February 4, 1980, Respondent, Yorke, was appointed Trustee in Bankruptcy of The Seeburg Corporation and deny each and every remaining allegation in Paragraphs IV(a) through (c).

V

Said Respondents deny each and every allegation of Paragraphs V(a) and (b).

VI

Said Respondents admit the allegations of Paragraph VI.

VII

Said Respondents deny each and every allegation of Paragraph VII.

VIII

Said Respondents deny each and every allegation of Paragraph VIII.

IX

Said Respondents deny each and every allegation of Paragraph IX.

X

Said Respondents deny each and every allegation of Paragraph X.

XI

Said Respondents admit that on February 11, 1980, Yorke, as Trustee in Bankruptcy for Seeburg in proceedings for reorganization under Chapter 11 of the Bankruptcy Code, Case No. 79 B 39597, and pursuant to an order of the United States Bankruptcy Court entered as of that date, terminated all personnel who were then employed by Seeburg with the exception of certain key individuals who were retained for services he deemed necessary in furtherance of the aforementioned reorganization proceeding. Said Respondents deny each and every allegation contained in Paragraph XI(b).

XII

Said Respondents deny each and every allegation of Paragraph XII.

WHEREFORE, The Seeburg Corporation and Nathan Yorke, Trustee in Bankruptcy, pray for the entry of an order dismissing the amended complaint of the National Labor Relations Board.

THE SEEBURG CORPORATION

By

One of its Attorneys

NATHAN YORKE

By:

One of his Attorneys

JOSEPH L. MATZ and NEIL P. GANTZ TELLER, LEVIT & SILVERTRUST, P.C.
One North LaSalle Street, Suite 1825
Chicago, Illinois 60602
312-782-3970

MALCOLM M. GAYNOR and CHAD H. GETTLEMAN
SCHWARTZ, COOPER, KOLB & GAYNOR CHARTERED
33 North LaSalle Street, Suite 2222
Chicago, Illinois 60602
312-726-0845

CERTIFICATE OF SERVICE

I, Chad H. Gettleman, hereby certify that on December 16, 1980, I filed and caused to be personally served the original and four (4) copies of the foregoing Answer to Amended Complaint upon Donald J. Crawford, Regional Director, National Labor Relations Board, Everett McKinley Dirksen Building, 219 South Dearborn Street, Room 881, Chicago, Illinois 60604, and further caused copies of the foregoing Answer to be deposited in the United States Mail Chute at 33 North LaSalle Street, Chicago, Illinois 60602, properly addressed, postage prepaid, addressed to the following:

Local 743, Warehouse
Employees Local
300 South Ashland Boulevard
Chicago, Illinois 60607

Edwin H. Benn, Esq.
Asher, Goodstein, Pavalon, Gittler
& Segall, Ltd.
228 North LaSalle Street
Chicago, Illinois 60601

CHAD H. GETTLEMAN
Chad H. Gettleman

JD-196-81
Chicago, IL

UNITED STATES OF AMERICA
Before The National Labor Relations Board
Division of Judges

NATHAN YORKE, TRUSTEE IN BANKRUPTCY, SUCCESSOR IN BANKRUPTCY, OR ALTER EGO TO THE SEEBURG CORPORATION AND SEEBURG SERVICE PARTS CO., A SINGLE EMPLOYER

and

Case No. 13-CA-19631

LOCAL UNION 743, WAREHOUSE, MAIL ORDER, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

William G. Kocol, Esq., of Chicago, IL, for the General Counsel.
Edwin H. Benn, Esq., of Chicago, IL, for the Union.
Narcisse A. Brown, Esq., of Chicago, IL, for Nathan Yorke, Trustee in Bankruptcy, The Seeburg Corporation.
Neil Gantz, Esq., of Chicago, IL, for The Seeburg Corporation.

DECISION

Statement of the Case

NANCY M. SHERMAN, Administrative Law Judge: This proceeding was heard before me on February 17, 1981,

pursuant to a charge filed on February 28, 1980, and amended on June 6 and 12, 1980, and a complaint issued on June 17, 1980, and amended on November 28, 1980. The complaint alleges that Respondent The Seeburg Corporation ("Seeburg") and Respondent Seeburg Service Parts Co. ("Seeburg Service") constitute a single integrated business enterprise and single and/or joint employer within the meaning of the National Labor Relations Act, as amended ("the Act"). The complaint further alleges that since about February 4, 1980, Respondent Nathan Yorke, who is admittedly trustee in bankruptcy for Seeburg, has had authority to continue operations and exercise all powers necessary to the administration of Seeburg and Seeburg Service.

The complaint goes on to allege that Respondents violated Section 8(a)(5) and (1) of the Act about February 8, 1980, by terminating operations, and discharging employees, without prior notice to Local Union 743, Warehouse, Mail Order, Technical and Professional Employees Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union") and without having afforded the Union an opportunity to negotiate and bargain concerning the effect of said conduct. An answer to the complaint was filed by counsel for Seeburg and counsel for Yorke, but not by Seeburg Service as such.

At the hearing, appearances were filed on behalf of Yorke and Seeburg, but not on behalf of Seeburg Service as such. On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for Yorke, counsel for the Union, and counsel for the General Counsel ("the General Counsel"), I hereby make the following:

Findings of Fact

I. Jurisdiction; the Relationship between Seeburg and Seeburg Service; the Appropriate Unit

At all material times until February 8, 1980, Seeburg, a Delaware corporation, has been engaged in the manufacture of juke boxes and other machinery in Chicago, Illinois. During the calendar year preceding November 28, 1980, a representative period, Seeburg sold and shipped goods and materials valued in excess of $50,000 directly to points outside Illinois. At all times material herein, Seeburg Service, a Delaware corporation, has been engaged in the manufacture and/or distribution of parts in Chicago, Illinois. During the calendar year preceding November 28, 1980, a representative period, Seeburg Service sold and shipped goods and services valued in excess of $50,000 directly to points outside Illinois. During the calendar year preceding November 28, 1980, a representative period, Seeburg, Seeburg Service, and Yorke as trustee, in the course of the business operations described above, collectively sold and shipped goods and provided services valued in excess of $50,000 directly to points located outside Illinois. I find that Seeburg and Seeburg Service were at all material times each engaged in commerce within the meaning of the Act; and that Respondents collectively were at all material times engaged in commerce within the meaning of the Act. Further, I find that the Board's jurisdictional standards are satisfied by the operations of Seeburg, of Seeburg Service, and of Respondents collectively.

Seeburg and Seeburg Service are both owned by the same entity; both operated at the same Chicago, Illinois facility; both were run by the same management; both purchased goods and services from the same customers; and both shipped their products to the same customers. Seeburg Service kept an inventory and filled orders on request for spare parts relating to the finished product that Seeburg sold. All the employees on

the Seeburg Service payroll had formerly been on the Seeburg payroll. I find that Seeburg and Seeburg Service constitute a single integrated business enterprise and single and/or joint employer within the meaning of the Act. *Sakrete of Northern California,* 137 NLRB 1220 (1962), 140 NLRB 765 (1963), enfd. 332 F.2d 902 (C.A. 9, 1964), cert. den. 379 U.S. 961 (1965).

In November 1977, Seeburg and the Union entered into a collective-bargaining agreement effective between October 1977 and September 1980, with respect to a unit of "all plant clerical, and all production and maintenance employees of the Company [The Seeburg Products Division of the Seeburg Corporation of Delaware] at its Chicago, Illinois Plant" excluding "executive, supervisory employees, timekeepers, foremen with power to hire and fire or to effectively recommend such action, office clerical employees, guards and professional employees, as defined in the [National Labor Relations Act], as amended." In October 1978, certain employees on Seeburg's payroll were transferred to Seeburg Service's payroll. All of the employees on Seeburg Service's payroll about January 1980 had at one time worked for Seeburg. The terms of the 1977-1980 collective-bargaining agreement were applied to the employees on the Seeburg Service payroll. Joseph P. Dillon, Seeburg's treasurer and the chairman of its board, testified that the contract was so applied on a "voluntary basis." However, Dillon further testified that at least some Seeburg Service employees were subject to the arrangement, set forth in the contract, that on an employee's written request, the employer would deduct union dues from his wages and pay them to the Union. Also, the contract contains a union-shop clause; and all of Seeburg's Service's plant clerical, production, and maintenance employees were union members. Sections 8(a)(3) and 302(c)(4) of the Act forbid an employer to pay to a union any membership dues deducted from his employees' wages, and to require union membership as a condition of employment,

without a collective-bargaining agreement calling for such action. I conclude that the Seeburg-Union agreement covered Seeburg Service's employees. Accordingly, I find that at all material times herein, the appropriate unit consisted of both Seeburg's and Seeburg Service's employees with the job classifications described in the collective-bargaining agreement.

On February 4, 1980, Yorke was appointed by the United States Bankruptcy court to act as Seeburg's trustee in bankruptcy. As shown *infra,* a few days later he closed down the operations of both Seeburg and Seeburg Service. At the hearing before me, Seeburg's attorney, Neil P. Gantz, stated without disagreement from any party that in preparing the schedules in the Bankruptcy Court, he had considered Seeburg Service's assets to be Seeburg assets, "and as it turned out, we agreed later on that [Seeburg Service's assets] were, in fact, part of the assets of the Seeburg Corporation."[1] Gantz further stated, in effect, that parts received from Seeburg Service by various distributors after the filing of Seeburg's petition for reorganization were received by them pursuant to petitions filed with and ruled on by the Bankruptcy Court. I find that Yorke was the trustee in bankruptcy for both Seeburg and Seeburg Parts. I find that at all material times after February 4, 1980, Yorke has been an employer within the meaning of the Act, and (for reasons stated *infra* Part II E) an *alter ego* of Seeburg and Seeburg Parts.

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[1] Gantz stated that he had believed until late 1979 or January 1980 that Seeburg Service was a subsidiary of Seeburg rather than, as it in fact was, a subsidiary of the same corporation which owned Seeburg. When the real corporate relationship was ascertained, separate bank accounts and payrolls were established. The Seeburg Service accounts were controlled by Seeburg treasurer Dillon. The record fails to show what other role, if any, he played in managing Seeburg Service.

II. The Alleged Unfair Labor Practices

A. Background

Before mid-July 1979, Seeburg and Seeburg Service had an active payroll of about 385 or 395 employees. The traditional vacation period was in late July or early August. However, because in 1979 Seeburg had financial or cash-flow problems, the vacation period that year began in Mid-July; and (although the vacation period proper ended in mid-August), nobody was called back to work until mid-September. Also, at that time only about 250 unit employees were recalled.

On October 19, 1979, Seeburg filed a petition for reorganization under Chapter 11 of the Bankruptcy Act. At about this time, further layoffs were effected, and the complement was reduced to about 150 unit employees. About early January 1980, the complement was again reduced to no more than 60 employees, mostly on Seeburg's payroll. By February 4, 1980, only about 7 unit employees were still actively working. Between October 19, 1970, and February 8, 1980, when except for the last 4 days Seeburg was a debtor in possession, Seeburg lost about $350,000.

The foregoing recalls and (inferentially) layoffs were effected in accordance with the seniority provisions of the collective-bargaining agreement. The Union never requested bargaining about the matter of the layoffs effected before February 4, 1980.

B. The Appointment of Trustee Yorke; The Shutdown of Operations

On February 4, 1980, the Bankruptcy Court appointed Yorke to act as trustee in bankruptcy for Seeburg. Yorke testified that his duties as trustee were to investigate Seeburg's financial condition and determine whether Seeburg had operated at a profit while it was a debtor in possession, to evaluate Seeburg's assets, and to attempt to file a plan of reorganization

on which creditors could vote. He further testified that he assumed that when he was appointed on February 4, he had full authority to operate Seeburg.

On February 4, 1980, at about 2 p.m., Yorke paid his first visit to the plant being used by Seeburg and Seeburg Parts. He was accompanied by attorney Malcolm Gaynor, who represented the creditors' committee, and a man named Greenhouse, who represented Seeburg. During this visit, Yorke saw only the first-floor production area, where the lights were turned off and nobody was present, and the office, where he saw only Dillon and a bookkeeper. However, as of that date, about 7 unit employees were still on the payroll.

At the first creditors' meeting on February 8, 1980, Dillon told them and Yorke under oath that Seeburg had lost about $350,000 since it filed its October 19 petition, it had about $5,000 in the bank, and it owed Seeburg's employees (unit and nonunit) more than $5,000 in wages.[2] Dillon further stated that Seeburg was on a secured lending basis with the Chase Manhattan Bank, all of Seeburg's receivables and inventory were pledged to Chase in return for periodic loans to Seeburg, and Chase had joined with other creditors in the petition to appoint a trustee. As of that date, Seeburg's liabilities exceeded $8 million and the book value of its assets approximated $6 million; *when liquidated, its assets amounted to about $1.5 million.*

Yorke testified that as trustee, he had the power to continue the business in operation without the approval of the Bankruptcy Court. He further testified that he sought an order to shut it down. On an undisclosed date between the close of the creditors' meeting on Friday, February 8, and the issuance of an order of the Bankruptcy Court on Monday, February 11,

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[2] They had been paid through February 2, 1980, but not for work performed thereafter. Dillon had control of a separate fund sufficient to meet the payroll of Seeburg Service (see *supra* fn. 1).

Yorke filed a motion, which is not in the record before me, with that Court. On February 11, 1980, the Bankruptcy Court issued an "Order Authorizing Trustee to Curtail Operations of the Debtor," which stated, in part:

THIS CAUSE coming on to be heard on the application of Nathan Yorke, trustee in bankruptcy, for authority to curtail the debtor's operations; due written notice having been given to all parties entitled thereto and the court being fully advised in the premises, it appearing that continued operations of the debtor in a manner similar to that which has been followed since the initiation of these proceedings, would be unprofitable and counter-productive to the instant reorganization proceeding;

IT IS ORDERED that Nathan Yorke, trustee in bankruptcy, be and he hereby is, authorized to curtail the debtor's operations by:

> (a) Terminating all personnel save certain key individuals who will be retained for services the trustee deems necessary in furtherance of the instant reorganization; . . .

C. The Shutdown without Notice to the Union

Yorke received this Order the day it was issued, February 11. That same day, he shut down the plant facility being used by both Seeburg and Seeburg Service, and released all the personnel, including about 7 unit employees. Yorke did not, before taking this action, give any notice to the Union that such action was contemplated.[3] He credibly testified that when he took this action, he did not know that a union represented Seeburg's employees; "the only one I spoke to was Mr. Dillon, and he didn't advise me of it."

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[3] One of the laid-off employees was the union steward. No contention is made that whatever notice he received of his own layoff constituted legally adequate notice to the Union that the operation had been shut down.

D. Events after the February 11, 1980 Shutdown

1. The February 1980 correspondence between the Union and Yorke

On February 15, 1980, union attorney Edwin H. Benn sent virtually identical letters to Yorke and to Seeburg which read in part as follows:

> The undersigned represents Local 743, I.B.T. The Union has a collective bargaining agreement covering the employees of Seeburg Corporation. . . .
>
> . . . It has also come to our attention that the remaining employees of Seeburg Corp. have been locked out as of February 11, 1980.
>
> * * *
>
> This is also to demand that an immediate meeting be set up so that we can discuss the decision and effects that your action has on our bargaining unit employees.

The letters went on to inquire the identity of the shareholders of Seeburg, X Cor International, Inc., and Choice Vend, Inc., and asked a number of other questions whose answers would tend to show whether these three corporations were interrelated in a manner which might impose duties on X Cor and/or Choice Vend with respect to employees on Seeburg's payroll.[4] Further, the letters asked for the names and addresses

[4] The June 1980 initial complaint herein alleged, *inter alia*, that "Respondent X Cor, Respondent Seeburg, Respondent Choice /Vend/, Respondent Yorke, . . . Respondent Seeburg Service" and other corporations were a single employer, a joint employer, or *alter egos*; and that Yorke was a successor in bankruptcy to Seeburg and/or the other corporations. The June 1980 complaint also included allegations that all the respondents named therein had violated Section 8(a)(5) and (1) when Choice Vend transferred unit work to Windsor Locks, Connecticut, from the Chicago plant involved herein, and discharged Chicago employees, without prior notice to the Union and without affording the Union an opportunity to negotiate regarding the decision to transfer and its effects. Prior to the hearing before me, the case was apparently settled with respect to X Cor, Choice Vend, and the other corporations named in the June 1980 complaint but not in the November 1980 complaint before me.

of any prospective purchasers of Seeburg. The letters concluded:

Please be advised that we expect our collective bargaining agreement to be abided by and we expect a response to this letter by close of business February 22, 1980. Failure to answer this letter by the time indicated will necessitate the institution of the proper proceeding.

Seeburg as such never answered this letter. Yorke's reply is dated February 25, 1980, and reads in its entirety:

I am in receipt of your letter dated February 15, 1980. Please be advised that the undersigned was appointed Trustee on February 4, 1980. Be further advised that the Trustee discontinued the operation of the business and has no employees.

In reply to your questions, Excor [sic] is a publicly owned company. Consolidated Entertainment owns all the stock of the Seeburg Corporation. I do not know who owns Choice Vend. I do not know if Choice Vend or Excor have any collective bargaining agreements with labor organizations.

If there is any further information you desire, I will be happy to furnish same.

Benn filed the initial charges herein on February 28, 1980, and made no further attempt to get in touch with Yorke. Meanwhile, on February 19, Yorke received about $6,000, apparently constituting all of Seeburg's cash on hand, which monies, pursuant to an order of the Bankruptcy Court, he used on February 25 to pay the Seeburg employees' wages for periods through Saturday, February 9, 2 days before the terminations.

2. Arrangements made between the Union and Yorke to recall a few employees

Thereafter, the Bankruptcy Court authorized Yorke to offer some parts for sale.[5] During an early April 1980 conference initiated by Yorke and Dillon, they discussed with union representative Harry Peters a plan to recall two or three unit employees to assist in the sale of the parts. Later, Peters telephoned Yorke that Peters would commit York and Dillon to recall certain individuals, and they were in fact recalled. Yorke and/or Dillon asked Peters for a letter authorizing this recall, and he sent that letter.

3. Yorke's efforts to reject the bargaining agreement

On an undisclosed date after February 15, Yorke filed with the Bankruptcy Court an application to reject the collective-bargaining agreement. This application was opposed by both the Union and the Board, and was subsequently withdrawn. However, the contract was eventually rejected under the specific terms of the plan of arrangement eventually approved by the Bankruptcy Court on July 28, 1980.

4. The July 22, 1980, settlement meeting

After the issuance of the original complaint herein, Gaynor, the attorney for the creditors' committee, telephoned union attorney Benn and requested a meeting. Benn told Gaynor that "we could discuss the charges, the complaint, and hopefully settlement." During this meeting, which was held on July 22, 1980, Gaynor made an unsuccessful effort to induce the Union to withdraw its unfair labor practice charges. At the hearing and in posthearing briefs, the General Counsel and union counsel requested me to disregard the evidence about what was

[5] The record fails to show whether these parts were owned by Seeburg or by Seeburg Parts. See *supra* Part I.

said during this July 22 meeting, on the ground that it constituted "compromise negotiations" within the meaning of Rule 408 of the Federal Rules of Evidence. I conclude that their position in this respect is well taken.[6]

5. Bankruptcy Court proceedings

On July 28, 1980, the Bankruptcy Court ruled that the backpay claimed by the Board as due in the instant proceedings was an administrative expense entitled to priority order under Section 507(a)(1) of the Bankruptcy Code. *Seeburg Corp.* v. *N.L.R.B.*, 105 LRRM 3050, 5 B.R. 364.[7] As of that date, the Board had modified its proof of claim so as to total $55,000. Also on July 28, the Bankruptcy Court approved a reorganization plan under which Seeburg and its purchaser in liquidation, Stern Electronics, Inc., agreed to set aside $49,000 of the estate's assets should a finding of backpay liability ultimately be made. Stern Electronics agreed to commit to cover the remaining $6,000 of the potential liability. *Seeburg, supra,* 105 LRRM at 3356.

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[6] Rule 408 is applicable to compromise offers made by a party to the litigation to a nonparty. 2 Weinstein's Evidence para. 408/01/, p. 408-13 (1980). Accordingly, I need not and do not consider whether Yorke's status as a party hereto rendered the creditors' committee a party also. Yorke Exhibit 1, a July 23, 1980, letter from Benn to Gaynor purporting to summarize the July 22 meeting, was offered by the General Counsel, and received in evidence, solely for the purpose of showing that the July 22 meeting was a settlement discussion.

[7] The Court also granted the request of Seeburg, Yorke, and the creditors' committee for an order enjoining the Board from processing the instant unfair labor practice case, which the Court said would be disposed of by the Court itself. On November 13, 1980, the United States District Court for the Northern District of Illinois vacated the Bankruptcy Judge's order, and directed him to refrain from hearing the unfair labor practice charges. 105 LRRM 3355.

The July 25, 1980, hearing on confirmation before the Bankruptcy Court was attended by, *inter alia,* attorney William G. Kocol on behalf of the NLRB, Benn on the Union's behalf, Gaynor on behalf of the creditors' committee, attorney Joseph Matz on Seeburg's behalf, and Yorke. Matz stated on the record that following the Bankruptcy Court's order confirming the plan of arrangement, there would be a closing as provided for in the contract, and Seeburg's assets would be transferred in due course to Stern. Matz went on to say that as of that moment there would be no more need for Yorke to maintain any operation whatsoever, that he would be terminating the remaining employees, and that he had told Matz that three of these employees were union employees. Gaynor said that if the Union wanted Yorke to bargain with respect to the effect of what he was doing pursuant to the plan and in the order of confirmation, "he is here and we would be glad to do such bargaining in open court. . . . I think we should do this first." The Bankruptcy Judge said that he would not attend bargaining, but his courtroom could be used for that purpose. Benn said that the Union would be more than happy to sit down with Yorke immediately, but might be unable to do so that day because the Union's bargaining representative, business agent Peters, was not there. Gaynor said that he wanted a stenographic record of the bargaining. Benn said that ". . . the Labor Board has held repeatedly that is unlawful [cf. *infra* fn. 10]. It takes away from the give and take of what happens at the bargaining table . . . I am happy [Gaynor] recognizes his right as of this point to let the bargainers do whatever they want to do." Gaynor said that there should be a stenographic record; "There is no give and take because there is nothing that Mr. Yorke has to give." The Bankruptcy Judge said, "Mr. Gaynor, we have the record here. You have made it very clear. This stenographic reporter is available. You have made your offer to negotiate, counsel has responded."

6. The late August discussions

By letter to Yorke dated July 31, 1980, union attorney Benn demanded that negotiations commence immediately

"concerning the effects of the final phase out of the Seeburg operation which was accomplished July 28, 1980." In consequence of this letter, a late August 1980 meeting was held between Seeburg attorney Gantz, creditors' committee attorneys Gaynor and Gettleman, union attorney Benn, union representative Peters, and Yorke. Benn asked how many employees had been on the Seeburg payroll as of February 1980. Gantz said seven. Benn asked for their names, wage rates, and classifications, and Gantz said he would get that information for Benn. There is no claim that Gantz failed to do so. Benn said that 300 or 400 people had been on layoff status when Seeburg filed its October 1979 petition, and asked whether Yorke could obtain jobs for them with Stern Electronics, the purchaser in liquidation. Yorke replied that he had no control over Stern. He said that letters of reference would be furnished to these employees, but no such letters were ever furnished. Benn asked if payments to the pension plan were current. He was told that they were, and accepted this representation. Benn asked whether payments had been made to the hospitalization insurance carrier. Gantz said that a claim for the premiums had been filed by the carrier, there was going to be no objection, the Bankruptcy Court was going to allow it, and employees would thereby obtain coverage for that period of time.

Benn said that he would like to discuss severance pay. Gaynor and Yorke told him to show some authority where Yorke could give severance pay. Benn said that the Bankruptcy Court had set aside $55,000 and had determined that it would "come off the top" as a cost of administration; that the Labor Board settlement, if agreed to, would amount to $7,000 or $8,000; and that the remainder could be distributed among the 400 employees (aside from the 7 retained on the payroll) as severance pay. Gaynor and Yorke said that they did not know under what section of the Bankruptcy Act Yorke would be able to make such a distribution, that these 300 or 400 employees whose jobs had been terminated in October 1979 had filed no

claims in the bankruptcy proceedings, and that the time had expired for them to file such claims. Benn said that he was not talking about the bankruptcy code, that he was talking about obligations under the National Labor Relations Act and the duty to bargain about effects. Yorke said that he did not operate under the labor laws, he operated under the Bankruptcy Act.

Gaynor said that as to the Labor Board case, the Government had a "bullshit case," and that Benn and NLRB attorney Kocol had conspired to file a fraudulent claim. Benn suggested that Gaynor tell this to the Bankruptcy Court judge. Benn said that he had heard from Kocol that there were discussions concerning settlement of the Labor Board case. Gaynor said that he would not settle the Labor Board case. Benn said that someone should tell that to Kocol, because Benn felt that Kocol was "being led down the path." Gaynor replied, ". . . they only listened to the Labor Board's offer, they were not going to settle it." Gaynor then asked Benn whether "we had bargained." Benn replied, "I suppose that remains to be seen at a later date." Nobody suggested a future meeting.[8]

[8] My findings as to what was said during this late August meeting are based mostly on the testimony of union attorney Benn, who was called as a witness by Respondent Yorke. I perceive no basis in Benn's credible testimony for his statement, at the end of his direct testimony, that "the entire meeting was settlement." A finding that at least part of this meeting constituted a settlement discussion would be warranted were I to credit Yorke's testimony that Gaynor said "he wouldn't suggest settling with the National Labor Relations Board unless the Union was a party to it . . . because that would leave the Union as an open end to the agreement." However, such testimony is inconsistent with Benn's credible testimony regarding Gaynor's expressed position, Yorke's counsel makes no contention that Benn's testimony varied from his contemporaneous notes (which he supplied to Yorke's counsel), and Yorke's testimony as a whole shows that he had a poor memory. Accordingly, I do not accept the testimony of Yorke summarized in this footnote. Hence, I perceive no credible factual predicate for Benn's contention, not renewed in his brief, that evidence as to the late August meeting is inadmissible under Rule 408 of the FRE as "statements made in compromise negotiations."

E. Analysis and Conclusions

When an employer decides to terminate or close its entire operation it must, once that decision is made, afford the employees' collective-bargaining representative the opportunity to bargain over the impact and effect of that decision on unit employees. *Burgmeyer Bros., Inc.*, 254 NLRB No. 126 (1981); *Summit Tooling Co.*, 195 NLRB 479 (1972), enfd. 474 F.2d 1352, 83 LRRM 2044, 2047 (C.A. 7, 1973). *This duty is not relieved by the employer's bankruptcy, and any consequent belief by it that it would be financially unable to meet any of the union's bargaining demands. Burgmeyer, supra.* A trustee in bankruptcy is the *alter ego* of the bankrupt employer, and, like that employer, is under a duty to comply with the National Labor Relations Act, including the requirement to engage in collective bargaining. *Jersey Juniors, Inc.*, 230 NLRB 329, 331-332 (1977); *Burgmeyer, supra.*

Immediately after the General Counsel and the Union had rested, counsel for Respondent Yorke admitted the truth of the complaint allegation that about February 8, 1980, Respondents terminated operations, and discharged the employees, without prior notice to the Union and without having afforded the Union an opportunity to negotiate regarding the effect of such conduct. Moreover, the record as a whole establishes that on February 11, 1980, Respondents in fact did this. The foregoing establishes, at least *prima facie,* that Respondents thereby violated Section 8(a)(5) and (1) of the Act.

Respondent Yorke defends his own failure to give the Union such notice on the ground that when he shut down the plant, he did not know that the employees had a collective-bargaining representative. Because Seeburg and Seeburg Parts obviously did know, I doubt the legal sufficiency of Yorke's defense in this respect. See *N.L.R.B.* v. *E.D.S. Service Co.*, 466 F.2d 157 (C.A. 9, 1972); *Jersey Juniors, supra,* 230 NLRB at 331-332; *N.L.R.B.* v. *Albuquerque Phoenix Express,* 368 F.2d 451, 452-453 (C.A. 10, 1966).

In any event, *Yorke failed to bargain with the Union about the shutdown's effect on employees even after it found out about the shutdown and made a written "demand that an immediate meeting be set up so that we can discuss the . . . effects that your action has on our bargaining unit employees."* Yorke's written response did not refer to the request for a meeting, but merely said that he had discontinued the operation of the business and had no employees, gave some of the information requested by the Union regarding corporations allegedly related to Seeburg, and said that he would be happy to furnish further information.[9] Furthermore, during the July 25, 1980, Bankruptcy Court session, Yorke remained silent when the attorney for the creditors' committee stated that there could be no give and take in bargaining because Yorke had nothing to give, and when Gaynor adhered to his insistence on a stenographic transcript of any bargaining sessions, notwithstanding Benn's statement that the Union would exercise its right to commence negotiations without a stenographer.[10] Indeed, at the hearing before me, Yorke attributed to himself some of the remarks which the Bankruptcy Court transcript shows were in fact made by Gaynor. Finally, when in August 1980 the Union asked Yorke to discuss severance pay, Yorke said that he had no authority under the Bankruptcy Act to make such payments and that he operated under that Act and not the labor laws. Indeed, Yorke

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[9] Yorke's counsel stated at the outset of the hearing that the Union's letter included a request that Yorke "bargain about the effects of" the closing. I agree, and do not accept counsel's contention, on page 4 of his post-hearing brief, that this letter was "ambiguous." See *Hankamer Ready Mix Concrete Co.*, 234 NLRB 608, 615 (1978); *Richmond, Division of Pak-Well*, 206 NLRB 260, 261 (1973). Moreover, I find that Yorke's failure to answer that portion of the letter constituted a refusal to bargain. *First National Maintenance Corp.* 242 NLRB No. 72, fn. 1 (1979), enfd. 627 F.2d 596 (C.A. 2, 1980), cert. granted, Jan. 12, 1981; *Summersville Industrial Equipment Co., Division of Marathon Coal Bit Co.*, 197 NLRB 731, 735 (1972).

[10] *Bartlett-Collins Co.*, 237 NLRB 770 (1978), enfd. 106 LRRM 2272 (C.A. 10, 1981).

did not even keep the promise which he gave during that meeting, after he was asked about obtaining jobs for the employees with Stern, to furnish the employees with letters of reference.

Conclusions of Law

1. At all material times until February 8, 1980, The Seeburg Corporation was engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. At all material times herein, Seeburg Service Parts Corporation was engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. At all material times herein, The Seeburg Corporation, Seeburg Service Parts Corporation, and Nathan Yorke, Trustee in Bankruptcy, collectively, were engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4. At all material times herein, The Seeburg Corporation and Seeburg Service Parts Corporation have constituted a single integrated business enterprise and single and/or joint employer within the meaning of the Act.

5. At all material times on and after February 4, 1980, Yorke has been the trustee in bankruptcy for The Seeburg Corporation and Seeburg Service Parts Corporation, and an employer within the meaning of Section 2(1) and (2) of the Act.

6. At all material times on and after February 4, 1980, Yorke has occupied *alter ego* status with respect to The Seeburg Corporation and Seeburg Parts Corporation.

7. The following employees of The Seeburg Corporation, Seeburg Service Parts Corporation, and/or Yorke, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All plant clerical, and all production and maintenance employees at the Chicago, Illinois plant, excluding executive, supervisory employees, timekeepers, foremen with power to hire and fire or to effectively recommend such action, office clerical employees, guards and professional employees as defined in the Act.

8. The Union is a labor organization within the meaning of Section 2(5) of the Act.

9. By virtue of Section 9(a) of the Act, the Union has been at all material times and still is the exclusive representative of the unit described in conclusion of law 7.

10. On February 11, 1980, The Seeburg Corporation, Seeburg Service Parts, and Yorke terminated operations at the Chicago, Illinois, facility, and discharged the employees at that facility, without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain concerning the effects of such conduct on unit employees.

11. By engaging in the conduct described in conclusion of law 10, The Seeburg Corporation, Seeburg Service Parts, and Yorke engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, which unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondents have violated the Act in certain respects, I shall recommend that Respondents be required to cease and desist therefrom. Affirmatively, *Respondents will be required to bargain with the Union, on request, with respect to the effects on employees of the decision to terminate operations, and to mail appropriate notices.*

I agree with Respondent that under *National Terminal Baking Corp., a Subsidiary of Kosher Kitchens,* 190 NLRB 465 (1971), *no backpay order should issue here.* Although it is unclear just when Yorke reached his decision to ask the Bankruptcy Court for permission to shut down the plant, 97 percent of the unit employees had been laid off before he became trustee, Seeburg had lost $350,000 during the 4 months before he became trustee, and Yorke had been trustee for only a week before receiving and acting on permission to shut down

the plant. Under these circumstances, as in *National Terminal,* Respondents' failure to bargain about effects did not occur at a time when the Union was in a position of economic strength. The backpay orders in the cases cited by the General Counsel and the Union constituted efforts to assure meaningful bargaining by restoring such strength in situations where, if the employer had timely complied with his duty to bargain about effects, the union could have imposed some economic pressure to compel the employer to accede to the union's demands.[11]

The Union requests an order affording it "bargaining expenses, attorneys' fees and other costs" on the ground that because "the Respondent [*sic*] has admittedly stated that it purposely refused to acknowledge its obligations under the Act, it is apparent that the defenses raised are patently frivolous." In further support of this contention, the Union alleges that the unfair labor practices in this case are "flagrant" and that it was "required to participate" in "many forays . . . in Respondent's [*sic*] actions in the bankruptcy court seeking injunctive relief against the Board proceedings." *To the extent that the Union is requesting its costs in the proceedings before the Bankruptcy Court and the District Court, the Union's request should be directed to those Courts and not to me. Further, Board precedent points to the denial of "costs" in connection with the instant litigation before the agency itself, because a major issue in this case is whether a backpay order should issue and, if so, to whom; and as to this issue, I have found Yorke's position not only nonfrivolous, but warranted.* See *Heck's, Inc.,* 215 NLRB 765 (1974); *Wellman Industries, Inc.,* 248 NLRB 325 (1980). *Indeed, I note that although the General Counsel and the Union*

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[11] *Burgmeyer, supra; First National Maintenance, supra,* 242 NLRB No. 72; *Thompson Transport Co.,* 184 NLRB 38 (1970); *Transmarine Navigation Corp.,* 170 NLRB 389 (1968). See also *Drapery Manufacturing Co., Inc.,* 170 NLRB 1706 (1968), enfd. 425 F.2d 1026 (C.A. 8, 1970), where there was a possibility that the employees who lost their jobs could have been absorbed into one of the employer's other operations.

both seek a backpay order, they disagree between themselves as to whether the beneficiaries should include the employees on layoff before the shutdown.

Upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended Order:[12]

ORDER

Respondents Nathan Yorke, Trustee in Bankruptcy; The Seeburg Corporation; Seeburg Service Parts Corporation; their officers, agents, successors, and assigns, shall:

1. Cease and desist from failing to bargain with Local Union 743, Warehouse, Mail Order, Technical and Professional Employees Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, about the effect, on employees in the following unit, of the decision to terminate operations on February 11, 1980:

All plant clerical, and all production and maintenance employees on the payroll of The Seeburg Corporation and Seeburg Service Parts Corporation at the Chicago, Illinois, plant, excluding executive, supervisory employees, timekeepers, foremen with power to hire and fire or to effectively recommend such action, office clerical employees, guards and professional employees as defined in the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

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[12] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Upon request, bargain collectively with the above-named labor organization with respect to the effect on employees in the above-described unit of the decision to terminate operations on February 11, 1980, and reduce to writing any agreement reached as a result of such bargaining.

(b) Mail a copy of the attached notice marked "Appendix"[13] to each employee in the appropriate unit (whether actively working or on layoff status) as of February 11, 1980. Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondents' authorized representatives, shall be mailed immediately upon receipt thereof.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

Dated Washington, D.C. April 23, 1981

/s/ NANCY M. SHERMAN
Nancy M. Sherman
Administrative Law Judge

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[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing in which all parties had a chance to present their evidence, it has been found that we violated the Act in certain ways. We have been ordered to mail you this notice. We intend to carry out the order of the Board and abide by the following:

WE WILL NOT fail to bargain with LOCAL UNION 743, WAREHOUSE, MAIL ORDER, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, about the effect on employees in the following unit of the decision to terminate operations on February 11, 1980:

All plant clerical, and all production and maintenance employees on the payroll of The Seeburg Corporation and Seeburg Service Parts Corporation at the Chicago, Illinois, plant, excluding executive, supervisory employees, timekeepers, foremen with power to hire and fire or to effectively recommend such action, office clerical employees, guards and professional employees as defined in the Act.

WE WILL, on request, bargain collectively with respect to the effect on employees in the above-described unit of the decision to terminate operations, and reduce to writing any agreement reached as a result of such bargaining.

NATHAN YORKE, TRUSTEE IN BANKRUPTCY
(Employer)

Dated _____ By _____
(Representative) (Title)

THE SEEBURG CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

SEEBURG SERVICE PARTS CO.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Chicago, IL 60604, Telephone (312) 353-7597.

259 NLRB No. 105

Chicago, IL

UNITED STATES OF AMERICA
Before the National Labor Relations Board

NATHAN YORKE, TRUSTEE IN BANKRUPTCY, SUCCESSOR IN BANKRUPTCY, OR ALTER EGO TO THE SEEBURG CORPORATION AND SEEBURG SERVICE PARTS CO.,[1] A SINGLE EMPLOYER

and

Case 13—CA—19631

LOCAL UNION 743, WAREHOUSE, MAIL ORDER, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On April 23, 1981, Administrative Law Judge Nancy M. Sherman issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Union filed exceptions and supporting briefs and Respondent filed cross-exceptions and an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Rela-

[1] Herein respectively called Seeburg and Seeburg Service.

tions Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order, as modified herein.

The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(5) and (1) of the Act by terminating its operations at its Chicago, Illinois, facility without prior notice to the Union and without affording it an opportunity to bargain with Respondent concerning the effects of such conduct on unit employees. However, we disagree with her further finding that no *Transmarine* backpay order[2] is warranted in the circumstances of this case.

The record shows that the unit employees were covered by a 3-year collective-bargaining agreement effective to September 1980. Prior to the vacation period which traditionally ends in mid-August, Respondent Seeburg had in mid-July 1979 an active payroll of about 385 or 395 employees. However, as Seeburg had financial or cash-flow problems, no one was called back to work until mid-September 1979 when only 250 unit employees were recalled.

On October 19, 1979, Seeburg filed a petition for reorganization under Chapter 11 of the Bankruptcy Act. At this time, there were further layoffs, and by January 1980, the complement was reduced to about 60 employees. By February 4, 1980, only seven employees were still actively working.[3] It appears the layoffs and recalls took place in accordance with

[2] *Transmarine Navigation Corporation and its Subsidiary, International Terminals, Inc.*, 170 NLRB 389 (1968).

[3] Their names appear in the record as follows: G. Pawlick, Mr. Szafader, Johnnie Miller, Mr. Kopczynski, T. Swienton, Mr. Lakos, and T. A. Valenza.

the seniority provisions of the parties' collective-bargaining agreement and that the Union did not request bargaining or object to any of the layoffs when they occurred.

On February 4, 1980, the Bankruptcy Court appointed Nathan Yorke to act as Seeburg's trustee in bankruptcy and Yorke was given authority to continue to operate the business. At a creditors' meeting on February 8, 1980, Yorke learned from Joseph P. Dillon, Seeburg's treasurer and chairman of its board, that Seeburg had lost about $350,000 since it had filed its October 19, 1979, petition, and that its liabilities exceeded $8 million and the book value of its assets approximated $6 million which, when liquidated, amounted to about $1.5 million. On February 11, 1980, Yorke requested, and the Bankruptcy Court issued, an order authorizing him, *inter alia,* to curtail Seeburg's operations by "terminating all personnel save certain key individuals who will be retained for services and the trustee deems necessary in furtherance of the instant reorganization. . . ."

Upon receipt of the order on February 11, Yorke shut down the plant facility used by both Seeburg and Seeburg Service and released all personnel including the seven unit employees who were still working on that date.[4] Four days later, the Union found out about the shutdown and demanded that an immediate meeting be set up to discuss, *inter alia,* the effects of Yorke's action. In his reply of February 25, Yorke failed to accede to this demand. Thereafter, the Bankruptcy Court authorized Yorke to offer some parts for sale and, in April 1980, Yorke and Dillon made arrangements with the Union to recall two or three individuals to assist in this endeavor. According to Yorke, he "operated the business" until July 1980, when, pursuant to a court-approved reorganiza-

[4] Pursuant to an order of the Bankruptcy Court, Yorke paid these employees their wages through February 9, 1980. Yorke did not notify the Union of the shutdown. If fact, Yorke at that time did not know that a union represented Seeburg's employees.

tion plan, Seeburg and its purchaser in liquidation, Stern Electronics, agreed to set aside $49,000 of the estate's assets should a finding of backpay liability ultimately be made by the Board.[5] In addition, Stern Electronics agreed to cover an additional $6,000 of potential backpay liability. Upon completion of the sale at the end of July 1980, Yorke terminated the employees who had been recalled in April 1980.

As stated above, the Administrative Law Judge properly found that Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union regarding the effects on unit employees of its decision to terminate operations on February 11, 1980. However, as already indicated, she found that a *Transmarine* backpay remedy as sought by the General Counsel was not warranted. In this connection, she pointed to the fact that 97 percent of the unit employees had been laid off before Yorke became trustee, that Seeburg had suffered a $350,000 loss during the 4 months before Yorke became trustee, and that Yorke served as trustee for only 1 week before shutting down the plant. In these circumstances, she also relied on the Board's Decision in *National Terminal*[6] to support her holding that, contrary to the *Transmarine* line of cases upon which the General Counsel relied, Respondent's failure to bargain about the effects of the closing did not occur at a time when the Union was in a position of economic strength. We find that *National Terminal, supra,* is inapposite as the employer therein was forced to close "in an almost emergency situation" because of "a calamitous event," namely, the theft of its delivery trucks which made it impossible to continue its operations.[7] In significant contrast, Respondent still had valuable assets at the time of the shutdown and, in fact, found it

[5] By that time the charge in the instant proceeding had been filed with the Board by the Union.

[6] *National Terminal Baking Corp., a Subsidiary of Kosher Kitchens, Inc.*, 190 NLRB 465 (1971).

[7] See *National Terminal Baking Corp., supra* at 466-467.

necessary to recall some employees to operate the business until its sale to another company. Thus, we find, contrary to the Administrative Law Judge, that in the instant case, unlike the situation in *National Terminal, supra,* a measure of balanced bargaining power existed prior to and at the time of the shutdown. As we held in *Burgmeyer Bros., Inc.,* 254 NLRB No. 126 (1981), and the cases cited therein, an employer is not relieved of its obligation to provide backpay in accordance with the *Transmarine* formula merely because it has become a debtor-in-possession under the Bankruptcy Act and believes that, as a result thereof, it wwuld be financially unable to meet any of the Union's bargaining demands.

Accordingly, we shall, in addition to ordering Respondent to bargain with the Union concerning the effects of the shutdown, accompany said Order with a limited backpay requirement for the seven employees who were actively working as of the time of the shutdown. The Union contends that the backpay remedy should also extend to the laid-off employees. We find no merit in this contention as the layoffs were lawfully made pursuant to the collective-bargaining agreement of the parties and the Union interposed no objection to them at the time they occurred. However, in view of the employee status of the individuals who were laid off prior to February 4, 1980, *we specifically find that the bargaining order extends to them as well as to the employees who worked until the time of the shutdown.*

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We shall also order that Respondent bargain with the Union over the effects on its employees of the discontinuance of its operations. It is clear, however, that a bargaining order alone cannot fully remedy the unfair labor practices committed by Respondent because, as a result of Respondent's failure to bargain with the Union about the effects of discontinuing operations, Respondent's employees were denied an opportunity to bargain through their exclusive representative at a time when such bargaining would have been meaningful. Meaningful bargaining cannot now be assured until some measure of economic strength is restored to the Union. Accordingly, in order to effectuate the purposes of the Act, we shall accompany our order to bargain with a limited backpay requirement designed both to make whole the seven employees, who were on the payroll on February 11, 1980, for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for Respondent. We shall do so in this case by requiring Respondent to pay backpay to its employees in a manner similar to that required in *Transmarine Navigation Corporation, supra.* As in *Transmarine,* we shall require that the backpay for those employees be not less that the amounts they would have earned during a 2-week period of employment,[8] at the rate of their normal wages when last in Respondent's employ.

Accordingly, we shall order Respondent to bargain upon request with the Union about the effects on its employees of the discontinuance of its operations; and to pay these employees amounts at the rate of their normal wages when last in Respondent's employ from 5 days after the date of this

[8] Despite his dissent in *Transmarine,* Member Jenkins notes that the remedy there has been accepted by the courts and the Board and, since some type of remedy for the misconduct is needed, he is therefore willing to join in the Decision herein. *Underwood Hair Adaption Process, Inc.,* 242 NLRB 1017, fn. 6 (1979); *Uncle John's Pancake House,* 232 NLRB 438, fn. 7 (1977).

Decision until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on those subjects pertaining to the effects of Respondent's discontinuance of its operations; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount each would have earned as wages from the time Respondent discontinued its operations to the time each secured equivalent employment elsewhere, or the date on which Respondent shall have offered to bargain, whichever occurs first; provided, however, in no event shall this sum be less than such employees would have earned for a 2-week period at the rate of their normal wages when last in Respondent's employ. Backpay shall be based upon earnings which the discharged employees would normally have received during the applicable period, less any net interim earnings, and shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Company*, 90 NIPP 289 (1950), with interest thereon computed in the manner provided in *Florida Steel Corporation*, 231 NLRB 651 (1977).[9]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Nathan Yorke, Trustee in Bankruptcy, Successor in Bankruptcy, or Alter Ego to the Seeburg Corporation and Seeburg

[9] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Member Jenkins would compute interest on backpay in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146, 148 (1980).

Service Parts Co., a Single Employer, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommend Order, as so modified:

1. Add the following as paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act."

2. Add the following as new paragraphs 2(b) and (c) respectively and reletter the subsequent paragraphs accordingly:

"(b) Provide backpay to G. Pawlick, Johnnie Miller, T. Swienton, T. A. Valenza, Mr. Szafader, Mr. Kopczynski, and Mr. Lakos in the manner set forth in the section of the Board's Decision entitled 'The Remedy.'

"(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. December 28, 1981

_____

John H. Fanning,
Member

_____

Howard Jenkins, Jr.,
Member

_____

Don A. Zimmerman,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT fail to bargain with Local Union 743, Warehouse, Mail Order, Technical and Professional Teamsters, Chauffeurs, Warehousemen and Helpers of America, about the effect on employees in the following unit of the decision to terminate operations on February 11, 1980:

> All plant clerical, and all production and maintenance employees on the payroll of The Seeburg Corporation and Seeburg Service Parts Corporation at the Chicago, Illinois, plant, excluding executive, supervisory employees, timekeepers, foremen with power to hire and fire or to effectively recommend such action, office clerical employees, guards and professional employees as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL, upon request, bargain collectively with respect to the effect on employees in the above-described unit of the decision to terminate operations, and reduce to writing any agreement reached as a result of such bargaining.

WE WILL pay the following unit employees who were discharged on February 11, 1980, when we terminated our operations, their normal wages, for the period set forth in the remedy section of the Board's Decision and Order, plus interest:

G. Pawlick	Mr. Szafader
Johnnie Miller	Mr. Kopczynski
T. Swienton	Mr. Iakos
T. A. Valenza	

NATHAN YORKE, TRUSTEE IN BANKRUPTCY
(Employer)

Dated_____ By_____
(Representative) (Title)

THE SEEBURG CORPORATION
(Employer)

Dated_____ By_____
(Representative) (Title)

SEEBURG SERVICE PARTS CO.
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7597.

YORKE EX. 2

IN THE UNITED STATES BANKRUPTCY COURT
For the Northern District of Illinois
Eastern Division

IN RE: THE SEEBURG CORPORATION, a Delaware corporation, *Debtor*	Case No. 79 B 39597

ORDER AUTHORIZING TRUSTEE TO CURTAIL OPERATIONS OF THE DEBTOR

At Chicago, in said District, on the 11th day of February, 1980.

THIS CAUSE coming on to be heard on the application of Nathan Yorke, trustee in bankruptcy, for authority to curtail the debtor's operations; due written notice having been given to all parties entitled thereto and the court being fully advised in the premises, it appearing that continued operations of the debtor in a manner similar to that which has been followed since the initiation of these proceedings, would be unprofitable and counter-productive to the instant reorganization proceeding;

IT IS ORDERED that Nathan Yorke, trustee in bankruptcy, be and he hereby is, authorized to curtail the debtor's operations by:

(a) Terminating all personnel save certain key individuals who will be retained for services the trustee deems necessary in furtherance of the instant reorganization; and

(b) Attempting to reduce utility and rental expenses to the lowest possible amount by agreement with debtor's landlord, Xcor International, Inc.; and

(c) Employing such other and further steps as the trustee feels are necessary to maintain and preserve the debtor's estate.

ENTER:

UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
For the Northern District of Illinois
Eastern Division

IN THE MATTER OF
THE SEEBURG CORPORATION,
a Delaware corporation,
DEBTOR

THE SEEBURG CORPORATION, NATHAN YORKE, Trustee of THE SEEBURG CORPORATION, and the OFFICIAL CREDITORS' COMMITTEE OF THE SEEBURG CORPORATION,
PLAINTIFFS

vs.

NATIONAL LABOR RELATIONS BOARD,
DEFENDANT

In proceedings for an arrangement under Chapter 11
No. 80 B 39597
Adversary Proceeding
No. 80 A 1088

ORDER

At Chicago, in said District, on the 28th day of July, 1980.

THIS CAUSE coming on to be heard upon the complaint of The Seeburg Corporation, debtor, Nathan Yorke, trustee in Bankruptcy, and the Official Creditors' Committee for a preliminary and permanent injunction against the National Labor Relations Board (NLRB) and the answer of the NLRB to said complaint, the court having considered the memoranda of law filed by the parties hereto and the statements of counsel; all parties entitled thereto having received due written notice of said hearing and the court being fully advised in the premises finds:

1. On October 19, 1979, the debtor filed its petition for relief under Chapter 11 of the Bankruptcy Code ("Reorganization Proceeding").

2. On February 4, 1980, Nathan Yorke was duly appointed trustee in the Reorganization Proceeding by the U. S. Trustee pursuant to this Court's order.

3. On February 11, 1980, this Court entered an order authorizing the Trustee to curtail the debtor's operations by, among other things, terminating all personnel save certain key individuals who would be retained for services the Trustee deemed necessary in furtherance of the Reorganization Proceeding; in accordance therewith, the Trustee did, in fact, so curtail the debtor's operations.

4. On June 17, 1980, the NLRB filed a Complaint and Notice of Hearing against the debtor and the Trustee, among others, alleging that they had engaged in unfair labor practices in that certain union members who were employed by the debtor had been terminated without prior notice to the union and without having afforded the union an opportunity to negotiate and bargain concerning the effects of said termination.

5. The NLRB has set Friday, August 1, 1980, as the date by which the debtor and the Trustee must file answers to its Complaint. Failure to file such an answer will be deemed by the NLRB as an admission of the truth of all of the allegations in said Complaint.

6. The NLRB, by order dated June 23, 1980, has scheduled a hearing on this matter for January 19, 1981.

7. On June 10, 1980, the debtor, its Trustee and Committee filed a Plan of Reorganization ("Plan") and accompanying Disclosure Statement in the Reorganization Proceeding. The approved Disclosure Statement and the Plan have been mailed to all creditors impaired by the Plan. The Plan

contemplates the sale of substantially all of the debtor's assets to Stern Electronics, Inc. The debtor's corporate identity will remain in existence until the terms and conditions of the Plan have been fully performed, but, upon confirmation of the Plan, the debtor will essentially cease to exist. The Disclosure Statement clearly reflects the precarious nature of the Plan's economic feasibility. Should the debtor's estate during the remainder of the Reorganization Proceeding incur or be forced to reserve amounts for administrative expenses and attorneys' fees beyond those currently estimated, the Plan will fail.

8. On July 10, 1980, the debtor, Trustee and Committee filed their Complaint against the NLRB seeking an order enjoining the NLRB from proceeding against the debtor and the Trustee for certain alleged unfair labor practices.

9. It would cause irreparable injury to the debtor and the creditors of its estate if debtor and trustee were required to appear in the NLRB administrative proceeding and respond to allegations made therein of unfair labor practices.

10. The NLRB administrative proceeding constitutes a direct attack upon the assets of this estate.

11. The NLRB has filed its claim herein in the amount of $142,413.60 which has been reduced in open court to $55,000. This court has original jurisdiction to hear and determine said claim.

NOW, THEREFORE, the Court concludes that:

(a) The Court has jurisdiction over the subject matter and over the parties herein.

(b) The actions of the NLRB in instituting an administrative proceeding against the debtor and the Trustee after the filing of the Reorganization Proceeding are subject to the control of and within the jurisdiction of this Court.

(c) It would cause irreparable injury to the debtor and the creditors of this estate if the debtor and Trustee were required to expend those funds necessary to appear in the NLRB administrative proceeding and respond to the allegations made therein of unfair labor practices.

IT IS, THEREFORE, HEREBY ORDERED as follows:

(1) The National Labor Relations Board, its agents and employees, be and they are hereby permanently restrained and enjoined from continuing to prosecute The Seeburg Corporation and Nathan Yorke, Trustee of The Seeburg Corporation, for damages for certain alleged unfair labor practices.

(2) Hearing upon the National Labor Relations Board's administrative claim filed herein in the amount of $55,000 be and the same is hereby set for the 23rd day of September, 1980, at the hour of 11:00 A.M. without further notice.

ENTER:

_____

BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
For the Northern District of Illinois
Eastern Division

EOD JUL 28 1980

IN RE:
THE SEEBURG CORPORATION,
Debtor.

THE SEEBURG CORPORATION, NATHAN YORKE, Trustee of THE SEEBURG CORPORATION, and the OFFICIAL CREDITORS' COMMITTEE of THE SEEBURG CORPORATION,
Plaintiffs,

vs.

NATIONAL LABOR RELATIONS BOARD,
Defendant.

In Proceedings for a Reorganization Under Chapter 11 of the Bankruptcy Code
No. 79 B 39597

Adversary
No. 80 A 1088

MEMORANDUM OPINION

This matter coming on to be heard upon the Complaint of THE SEEBURG CORPORATION, NATHAN YORKE, Trustee of THE SEEBURG CORPORATION, and the OFFICIAL CREDITORS' COMMITTEE of THE SEEBURG CORPORATION for the entry of an order enjoining the Defendant from prosecuting its action for damages against THE SEEBURG CORPORATION and NATHAN YORKE, Trustee of THE SEEBURG CORPORATION, before the National Labor Relations Board, Region 13, Case 13-CA-19631, and upon Defendant's Answer thereto, and the parties appearing by their respective attorneys, and

The Court having examined the pleadings filed in this matter, and having heard the arguments of counsel, and having

received and examined Memoranda of the parties in support of their respective positions, and the Court being fully advised in the premises;

The Court Finds:

1. On October 19, 1979, THE SEEBURG CORPORATION, a Delaware corporation, filed its voluntary petition for relief under chapter 11 of the Bankruptcy Code. NATHAN YORKE was duly appointed Trustee of THE SEEBURG CORPORATION by the United States Trustee for the Northern District of Illinois on February 4, 1980.

2. On February 11, 1980, this Court entered an Order which provided in relevant part as follows:

". . . .

IT IS ORDERED that Nathan Yorke, trustee in bankruptcy, be and he hereby is, authorized to curtail the debtor's operations by:

(a) Terminating all personnel, save certain key individuals who will be retained for services the trustee deems necessary in furtherance of the reorganization.

". . . ."

Pursuant to the aforesaid order, NATHAN YORKE terminated all the Debtor's personnel save certain key individuals whose services were deemed necessary in furtherance of the instant reorganization. Subsequent thereto, the Trustee, pursuant to court order, rehired in connection with the sale of parts inventory some of the employees previously terminated.

3. On or about June 10, 1980, Plaintiffs filed a Plan of Reorganization and Disclosure Statement in the instant reorganization proceedings. The Plan of Reorganization includes and incorporates by reference a settlement agreement which contemplates the sale to Stern Electronics, Inc. of substantially all of the assets of THE SEEBURG CORPO-

RATION. The Agreement further provides that if the Confirmation Order has not been entered and become final before August 15, 1980, the Agreement will terminate and be of no force and effect.

4. On June 17, 1980, NATIONAL LABOR RELATIONS BOARD, Region 13 filed a Complaint before the National Labor Relations Board, Region 13, Case 13-CA-19631, alleging that THE SEEBURG CORPORATION and NATHAN YORKE, Trustee of THE SEEBURG CORPORATION, among others, engaged in unfair labor practices affecting commerce by terminating employees of the Debtor without prior notice to their union and without having afforded the union an opportunity to negotiate and bargain concerning the effects of said conduct.

5. On July 2, 1980, this Court entered an Order approving the aforesaid Disclosure Statement and setting the hearing on confirmation of the Plan of Reorganization for July 25, 1980.

6. On July 22, 1980, three days before the scheduled hearing on confirmation, the NATIONAL LABOR RELATIONS BOARD filed on behalf of certain former employees of the Debtor a proof of claim in the amount of $142,413.60, alleging that the claim was entitled to priority. The alleged basis for the claim is the violation by Debtor of the National Labor Relations Act, as amended, as set forth in the Complaint in Case 13-CA-19631 before the National Labor Relations Board, Region 13.

The Court Concludes and Further Finds:

1. § 507 of the Bankruptcy Code provides in pertinent part as follows:

> "(a) The following expenses and claims have priority in the following order:
>
> (1) First, administrative expenses allowed under section 503(b) of this title....
>
> ...."

§ 503(b) of the Bankruptcy Code provides in relevant part as follows:

> "(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including—
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case . . . .
>
> . . . ."

The alleged unfair labor practices occurred during the administration of the instant chapter 11 proceeding. The claim, insofar as it represents a claim for back pay, seeks a reparation order designed to vindicate public policy by making the employees whole for losses suffered on account of an unfair labor practice. *See Nathanson v. National Labor Relations Board,* 344 U.S. 25, 97 L.Ed. 23, 73 S.Ct. 80 (1952). The claim, essentially one for damages for injury to the employees, is one of the "actual, necessary costs and expenses of preserving the estate" within the meaning and purview of § 503(b)(1)(A). *See Reading Company v. Brown,* 391 U.S. 471, 20 L.Ed. 751, 88 S.Ct. 1759 (1968). It is an administrative expense entitled to priority under § 507(a)(1) of the Bankruptcy Code.

2. § 1129 of the Bankruptcy Code provides in relevant part as follows:

> "(a) The court shall confirm a plan only if all of the following requirements are met:
>
> . . . .
>
> (9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—
>
> (A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

Under this provision, the Court shall not confirm a plan unless administrative expenses are paid. It is therefore essential in connection with the hearing on confirmation that the claim of the NATIONAL LABOR RELATIONS BOARD be liquidated.

3. This Court has jurisdiction to determine the underlying liability and to liquidate the claim of the NATIONAL LABOR RELATIONS BOARD. § 241(a) of Title II of the Bankruptcy Reform Act of 1978 provides as follows:

> "(a) Title 28 of the United States Code is amended by inserting immediately after chapter 89 the following:
>
> . . . .
>
> § 1471. Jurisdiction.
>
> . . . .
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.
>
> (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts
>
> . . . .
>
> . . . ."

§ 402(a) of Title IV of the Bankruptcy Reform Act of 1978 provides that the aforesaid amendment shall take effect on April 1, 1984. However, § 404(a) of Title IV provides that the courts of bankruptcy existing on September 30, 1979 shall continue through March 31, 1984 to be the courts of bankruptcy for purposes of the Bankruptcy Reform Act of 1978, and § 405(b) of said Title further provides as follows:

> "(b) During the transition period, the amendments made by sections 241, 243, 250, and 252 of this Act shall apply to the courts of bankruptcy continued by section

> 404(a) of this Act the same as such amendments apply to the United States bankruptcy courts established under section 201 of this Act."

This court therefore has original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11. The determination of the underlying liability and the liquidation of the claim of the NATIONAL LABOR RELATIONS BOARD fall within this grant of jurisdiction.

4. This Court also has jurisdiction to issue the prayed for injunction pursuant to the powers granted under § 105(a) of the Bankruptcy Code:

> "(a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

The issuance of an injunction against the NATIONAL LABOR RELATIONS BOARD in this case is both necessary and appropriate to carry out the provisions of title 11 of the United States Code. The Supreme Court, in *Nathanson v. National Labor Relations Board, supra,* indicated that the bankruptcy court should normally stay its hand pending the decision of the Board:

> "The bankruptcy court normally supervises the liquidation of claims. See *Gardner v. New Jersey,* 329 U.S. 565, 573. But the rule is not inexorable. A sound discretion may indicate that a particular controversy should be remitted to another tribunal for litigation. See *Thompson v. Magnolia Co.,* 309 U.S. 478, 483. And where the matter in controversy has been entrusted by Congress to an administrative agency, the bankruptcy court normally should stay its hand pending an administrative decision."

Nathanson v. National Labor Relations Board, supra at 30. The instant case, however, does not present the normal situation involving the reorganization of a debtor, since the subject claim

is one for an administrative expense, the determination of which is an exclusive function of this Court and which is directly related to the Court's responsibility in its consideration of the entry of an order confirming a plan of reorganization.

The Ninth Circuit Court of Appeals, in *Re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248 (9th Cir. 1979), distinguished between the automatic stay provision of Bankruptcy Rule 11-44 and a stay issued as an exercise of discretion. The court could not determine in that case whether the stay imposed was an automatic or a discretionary stay and held, in light of the Supreme Court's suggestion in *Nathanson* that the bankruptcy court should be reluctant to interfere with Board proceedings, that it would be inappropriate to hold that such proceedings are automatically stayed. However, the Ninth Circuit Court of Appeals indicated that if reorganization proceedings threaten the assets of the estate, the decision is issue a stay can be made on a discretionary basis. The court therein found that the stay granted by the bankruptcy court, even if issued as an exercise of discretion, should not have been imposed. It appeared that the bankruptcy court issued the stay because a receiver was operating the business and constituted "...'a new and distinct juridical entity' against whom the prior unfair labor practices could not be remedied." *In re Bel Air Chateau Hospital, Inc., supra* at 1251. The court pointed out that whether or not the receiver was a successor to the earlier employer and an entity against whom the unfair labor practices could be remedied was a matter of federal labor law. The court stated:

> "It is by no means clear in the event that the Board should determine that Bel Air committed unfair labor practices that it cannot enforce a remedial order against the Receiver, *see, e.g., NLRB v. Coal Creek Coal Co.*, 204 F.2d 579 (10th Cir. 1953), especially in light of established policy against allowing employers to change their legal form as a means of evading their responsibility under the Act."

Id.

The most recent pronouncement in this area is *In re Shippers Interstate Service, Inc.*, 618 F.2d 9 (7th Cir. 1980), which involved the automatic stay of Bankruptcy Rule 11-44. The court quoted the above language from *Bel Air* and emphasized the distinction between liquidation and reorganization, warning that Chapter XI should not be used as an easy sanctuary from federal regulatory proceedings. The court held:

> "... [W]here, as here, it appears that the assets of the estate are not threatened and the company is being reorganized rather than liquidated, Bankruptcy Rule 11-44 shall not apply and regulatory proceedings of the National Labor Relations Board are not subject to the automatic stay provisions of that bankruptcy rule. This does not preclude imposition of a stay where a proper showing was made that the regulatory proceedings threatened the estate assets or that the bankruptcy or other proceedings would result in the liquidation of the Company."

Id. at 13.

In the instant case, the alleged unfair labor practices occurred during the administration of the Chapter 11 proceeding. THE SEEBURG CORPORATION did not file its Chapter 11 petition in order to avoid obligations under the National Labor Relations Act. The Plan of Reorganization provides for the sale of substantially all of the Debtor's assets to Stern Electronics, Inc. Since the Chapter 11 proceedings will result in the liquidation of the corporation if the Plan of Reorganization is confirmed, the imposition of a stay is appropriate and not precluded under *In re Shippers Interstate Services, Inc., supra.*

Concurrent herewith, an injunctive order will be entered in favor of Plaintiffs against Defendant, NATIONAL LABOR RELATIONS BOARD.

Dated at Chicago, Illinois, this 28th day of July, A.D., 1980.

ENTER

_____

Bankruptcy Judge

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable Bernard M. Decker

Cause No.: 79 B 39597—80 C4624 Date: Nov. 13, 1980

Title of Cause: In the matter of the Seeburg Corporation, Debtor. The Seeburg Corporation, et al. *v.* National Labor Relations Board

Brief Statement of Motion: _____

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel: _____

_____

Representing: _____

_____

Names and Addresses of other counsel entitled to notice and names of parties they represent: _____

_____

Reserve space below for notations by minute clerk

Memorandum Opinion and Order entered. For the reasons set forth in said opinion and order, the court concludes that the NLRB's appeal is well taken. The bankruptcy judge's order staying the Board's unfair labor practice proceeding is hereby vacated. The bankruptcy judge is hereby ordered to refrain from hearing the unfair labor practice charges. (DRAFT)

Docketed Nov. 14, 1980

Decker, *J.*

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

IN THE MATTER OF THE SEEBURG CORPORATION, *Debtor*	NO. 79 B 39597
THE SEEBURG CORPORATION, et al., *Plaintiffs,* *-vs-* NATIONAL LABOR RELATIONS BOARD, *Defendant.*	NO. 80 C 4624

MEMORANDUM OPINION AND ORDER

On February 8, 1980, the trustee in bankruptcy for Seeburg Corporation, acting on the authorization of the bankruptcy judge, discharged certain of Seeburg's employees and terminated certain of its operations. In so doing, the trustee allegedly failed to notify and negotiate with the collective bargaining representative of the terminated employees. The NLRB has charged that this conduct violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act. 29 U.S.C. §§158(a)(1), 158(a)(5). A hearing on these charges was set before the National Labor Relations Board for September 15, 1980. On July 9, 1980, the bankrupt company, the trustee, and the creditors committee all requested that the bankruptcy judge held on July 25, the Board reduced its proof of claim against the company from $142,000 to $55,000. With the bankruptcy judge's approval, the company and its purchaser in liquidation

agreed to set aside $49,000 of the estate's assets should a finding of backpay liability ultimately be made. The purchaser agreed to commit to cover the remaining $6,000 of potential liability. Accordingly, the motion for a stay of the NLRB proceedings was granted at that time.

On July 28, 1980, the bankruptcy judge entered a memorandum opinion affirming his oral order and stating that he, rather than the Board, would adjudicate the unfair labor practice charge. A hearing date was set for September 23. On August 4, 1980, the Board filed an emergency petition seeking to stay the bankruptcy court's hearing. At the same time, the Board filed its appeal from the bankruptcy judge's order. Both motions were docketed on August 29, and, on September 10, this court stayed both the unfair labor practice proceeding before the bankruptcy court, and the unfair labor practice proceeding before the National Labor Relations Board. Briefing on the appeal having been recently completed, the merits of this case are now ripe for disposition.

The Seventh Circuit has recently and expressly held that proceedings of the National Labor Relations Board are not automatically stayed by a bankruptcy filing. *In the Matter of Shippers Interstate Service, Inc.*, 618 F.2d 9 (7th Cir. 1980). The court so held primarily on the basis of the strong public policies favoring exclusive disposition of substantive labor law questions by the NLRB.

In asserting his jurisdiction in this matter, the bankruptcy judge distinguished *Shippers* on the basis of that case's closing paragraph:

> "On balance, we agree with *Bel Air* that '[i]f regulatory proceedings threaten the assets of the estate, the decision to issue a stay can then be made on a discretionary basis. . . . But where, as here, it appears that the assets of the estate are not threatened and the company is being reorganized rather than liquidated . . . regulatory proceedings of the National Labor Relations Board are not subject to the

> automatic stay provisions of . . . [the Bankruptcy Act] . . . This does not preclude imposition of a stay where a proper showing was made that the regulatory proceedings threatened the estate assets or that the bankruptcy or other proceedings would result in the liquidation of the company." *Shippers, supra,* 618 F.2d at 13.

The bankruptcy judge below reasoned that any backpay award to issue from the NLRB action would have priority over other claims on the bankrupt's assets because it would arise from the court's administration of the bankrupt's estates. This, the court concluded, would constitute a "threat" to the estate within the meaning of the *Shippers* decision. The judge also concluded that, since virtually all of the assets of the bankrupt are going to be sold to a third party, this bankruptcy is more in the nature of a liquidation than a reorganization.

Regardless of the priority that the unfair labor practice claims may have, the transcript of the July 25 hearing plainly reveals that the company, its purchaser, and the bankruptcy judge have already approved a reorganization plan which includes a provision setting aside the full potential backpay claim. Accordingly, the court finds it difficult to understand the sense in which a Board finding of backpay liability will materially threaten the estate's assets.

Problems also arise with the bankruptcy judge's conclusion that this is really a liquidation proceeding. *Shippers* distinguishes between reorganizations and liquidations on the grounds that a reorganized corporation may be subject to liability under the NLRA as a successor of the entity which originally went bankrupt. The court emphasized that, under such circumstances, the underlying unfair labor practice charge and the question of successorship both implicate significant labor law issues that should be left to the Board's superior expertise. The liquidation case was distinguished on the grounds that no possible successor entity exists in that situation, thus mooting all of the potential labor law problems. *Shippers,*

618 F.2d at 12. In this case, virtually all of the bankrupt's assets are being sold to a single entity which is making the purchase with full knowledge of the pendency of the unfair labor practice charges and which agreed to terms of sale that also accommodate the possibility of a backpay assessment. Under these circumstances, the Board might well conclude that the purchaser could be held liable under the NLRA as the bankrupt's successor. *See, e.g., Golden State Bottling v. NLRB,* 414 U.S. 168 (1973). The likelihood that the successorship doctrine might apply here seems to implicate the policies which the Seventh Circuit has deemed dispositive in the reorganization context. Accordingly, the rule developed in the reorganization cases would seem applicable to the July 28 stay.

For all of the above reasons, the court concludes that the NLRB's appeal is well taken. The bankruptcy judge's order staying the Board's unfair labor practice proceeding is hereby vacated. The bankruptcy judge is hereby ordered to refrain from hearing the unfair labor practice charges.

ENTER:

/s/ BERNARD M. DECKER
Bernard M. Decker
United States District Judge

DATED: November 13, 1980.

Opinion by Judge Timbers
Judge Coffey dissenting
NLRB JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 1, 1983

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. WILLIAM H. TIMBERS, Circuit Judge*

No. 82-1334

Nathan Yorke, Trustee in Bankruptcy
The Seeburg Corporation,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

Warehouse, Mail Order, Office, Professional and Technical Employees Union Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Intervening-Respondents.

Petition for Review of an Order of the National Labor Relations Board.

This cause came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the decision of the National Labor Relations Board is MODIFIED AND, AS MODIFIED, ENFORCED, with costs, in accordance with the opinion of this Court filed this date.

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* The Honorable William H. Timbers of the United States Court of Appeals for the Second Circuit, is sitting by designation.

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-1334

NATHAN YORKE, TRUSTEE IN BANKRUPTCY, THE SEEBURG CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

WAREHOUSE, MAIL ORDER, OFFICE, PROFESSIONAL AND TECHNICAL EMPLOYEES UNION, LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor.

Petition for Review of Order of the
National Labor Relations Board
Cross-Application for Enforcement of Order

ARGUED DECEMBER 1, 1982—DECIDED JUNE 1, 1983

Before CUDAHY, COFFEY, and TIMBERS*, *Circuit Judges.*

---

* Of the Second Circuit, by designation.

TIMBERS, *Circuit Judge.* Nathan Yorke, Trustee in Bankruptcy of the Seeburg Corporation (Company),[1] petitions for review of an order of the National Labor Relations Board, 259 N.L.R.B. 819 (1981), finding that the Trustee violated §§ 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5), 158(a)(1) (1976), by failing to bargain over the effects of his decision to close the Company's plant in Chicago. The Board has filed a cross-application to enforce its order.

Without giving Local 743, International Brotherhood of Teamsters (Union), prior notice or affording it a subsequent opportunity to bargain, the Trustee terminated operations and discharged the seven remaining employees who were Union members. The Board determined that a bargaining order by itself would not remedy the unfair labor practice since the plant closure had decimated the Union's bargaining strength. Accordingly, to restore the Union's position, the Board ordered a limited backpay remedy, requiring the Trustee to pay wages to the seven employees for a period beginning five days after the date of the Board's decision until (1) the parties reached an agreement, or (2) the parties reached an impasse, or (3) the Union failed to request bargaining within five days after the decision, or (4) the Union failed to bargain in good faith. While the backpay requirement was conditioned on the number of days lapsing before the parties reached impasse or an agreement, the Board imposed a minimum two week backpay period to discourage artificially quick impasse.

Although we are not in complete accord with the Board's reasoning, we conclude that substantial evidence supports the Board's findings of violations of §§ 8(a)(5) and 8(a)(1). We enforce the Board's remedial order with the condition specified herein.

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[1] The Administrative Law Judge (ALJ) found that Seeburg Service Parts Co. and Seeburg Corp. constituted a single integrated business enterprise. The Trustee filed no exception to that finding.

I.

The Company, a Delaware Corporation, was engaged in the manufacture of juke boxes and other machinery at its facility in Chicago. In November 1977, it entered into a three-year collective bargaining agreement with the Union with respect to a unit of "all plant clerical, and all production and maintenance employees of the Company". As of July 1979, Seeburg employed approximately 385 employees. Shortly thereafter, the Company experienced severe financial reversals. It began laying off employees. The Union did not challenge the propriety of the layoffs.

On November 1, 1979, the Company filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1174 (Supp. III 1979). At the time, the Company still employed 150 members of the bargaining unit. The Company as debtor-in-possession continued its operations on a diminishing basis. It continually reduced its complement of employees, reaching a low of seven in early 1980. Because of allegations of fraud and mismanagement, the bankruptcy court appointed Nathan Yorke as Trustee in Bankruptcy for the debtor company on February 4, 1980. As Trustee, Yorke assumed full control of the Company. His duties primarily were to evaluate Seeburg's assets and formulate a plan of reorganization which would be acceptable to all creditors. 11 U.S.C. § 1106(a) (Supp. III 1979).

Yorke first visited the plant on the day of his appointment, February 4. He found no unit employees working in the production area. Seven unit employees, however, remained on the Company payroll. The ALJ credited Yorke's testimony that he did not know that the employees belonged to a union.

At the first creditors' meeting on February 8, Yorke learned that the Company owed its employees more than the $5000 it had in the bank and that its $6,000,000 in unliquidated assets (worth approximately $1,500,000 if liquidated) were eclipsed by overall liabilities exceeding $8,000,000. Following the meeting, Yorke decided that

it was in the Company's best interest to terminate operations completely. He immediately applied to the bankruptcy court for authorization. The court granted the application on February 11. Yorke closed the plant the next day. Yorke obtained $6000 in funds from Seeburg's cash on hand to pay the employees for the period through February 9. He admittedly did not notify the Union of his decision to terminate operations.

By a letter dated February 15, the Union, through its attorney Edwin H. Benn, requested bargaining over the effects of the plant closure. In pertinent part, the letter read as follows:[2]

"Gentlemen:

The undersigned represents Local 743 I.B.T. The Union has a collective bargaining agreement covering the employees of Seeburg Corporation. As you are well aware, this agreement governs the wages, hours and working conditions of those employees.

It is apparent to the undersigned that the rights of these employees are being seriously undermined. It has come to our attention that numerous employees whom we represent are being transferred to do work for different companies within your corporate structure and that work, covered by our contract, is being performed elsewhere. It has also come to our attention that the remaining employees of Seeburg Corp. have been locked out as of February 11, 1980. . . .

This is also to demand that an immediate meeting be set up so that we can discuss the decision and effects that your action has on our bargaining unit employees. . . .

. . . [W]hat were the reasons that the Seeburg employees were denied the ability to come to work

[2] In view of their direct bearing on the issues before us, we set forth at length the pertinent portions of the Union's letter of February 15 and the Trustee's reply of February 25.

on February 11, 1980. Will they be transferred to other payrolls of either Choice Vend, XCor or any other companies under those companies' control? What has happened to the Seeburg supervisory personnel? Have they been transferred to either Choice Vend, XCor or any companies under those companies' control?

Third, are you aware of any prospective purchasers of the Seeburg Corporation? If so, please identify their names and addresses. If a sale or other disposition of the Seeburg Corporation is contemplated, please inform us what will happen to the existing facility, such as the property, fixtures, machinery, trucks, furniture, etc.? In particular, we would desire to know if there will be a sale or transfer to other companies within the XCor Corporation. If there will be an acquisition by another XCor Corporation company, we would like to know the intentions of XCor concerning future employment of the managerial, supervisory, or other non-union employees who have been working for Seeburg. This would also include any transfer of employees to Choice Vend. Further, we would desire to know what will happen to existing accounts receivable and payable, existing lease agreements or contracts, other existing liabilities as well as good will. We would further desire to know the disposition of any existing commitments to customers or creditors. We are particularly interested in knowing what will be the disposition of work done by Seeburg employees covered by our collective bargaining agreement. Will that work be transferred to any other entity within the XCor Corporation or Choice Vend?

Please be advised that we expect our collective bargaining agreement to be abided by and we expect a response to this letter by close of business February 22, 1980. Failure to answer this letter by the time indicated will necessitate the institution of the proper proceeding."

Yorke responded to this letter on February 25, stating:

> "I am in receipt of your letter dated February 15, 1980. Please be advised that the undersigned was appointed Trustee on February 4, 1980. Be further advised that the Trustee discontinued the operation of the business and has no employees.
>
> In reply to your questions, Excor is a publicly owned company. Consolidated Entertainment owns all the stock of the Seeburg Corporation. I do not know who owns Choice Vend. I do not know if Choice Vend or Excor have any collective bargaining agreements with labor organizations.
>
> If there is any further information you desire, I will be happy to furnish same."

The Union interpreted Yorke's letter as a refusal to bargain and consequently filed an unfair labor practice complaint on February 28, alleging that the Trustee had committed various unfair labor practices, including failing to bargain in good faith.[3] No discussions between the Trustee and the Union ensued.

In April, Yorke informed the Union that the Company planned to recall several employees to assist in selling parts as authorized by the bankruptcy court. Ultimately, three bargaining unit employees worked at the plant for the next three to four months. The General Counsel filed a complaint in June, alleging that the Trustee's failure to give notice that he was terminating operations and his subsequent failure to bargain over the effects of that decision constituted violations of §§ 8(a)(5) and 8(a)(1) of the Act.

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[3] The complaint alleged that the Company had violated the Act by transferring employees without prior notification to the Union and by refusing to furnish information that the Union requested. The Regional Director chose not to press these charges.

Within the month following the filing of the General Counsel's complaint, the Trustee located a potential purchaser for the remaining assets of the Company. Creditors agreed to the Trustee's plan of liquidation in July. The bankruptcy court approved the plan on July 28. At that time, the court also ruled that the Board's backpay claim on behalf of the employees, pending the unfair labor practice proceeding, was an administrative expense entitled to priority under the Bankruptcy Code. After negotiations among the Board, the Trustee, and the prospective purchaser of the Seeburg assets, the purchaser agreed to set aside $49,000 of assets and $6000 of its own money to cover the backpay claim in the event the Company ultimately should be found liable.

Upon concluding the unfair labor practice hearing in February 1981, the ALJ determined that the Trustee had committed the violations as charged. As a consequence, the ALJ recommended issuing a bargaining order. The Board adopted the ALJ's findings but found that a bargaining order by itself was insufficient to remedy the violations. Consequently, the Board imposed a sliding backpay requirement upon the Trustee in accordance with its decision in *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968). This was to strengthen the Union's bargaining position to a point approximating the one the Union enjoyed at the time the Trustee closed the plant.

The Trustee petitions to review and set aside the Board's order. The Board has filed a cross-application to enforce its order. The Union as intervenor has filed a brief urging that the Board's order be enforced.

II.

We start with the proposition that a Trustee in Bankruptcy, like any other employer, must abide by the labor laws, as long as they prescribe conduct consistent with the duties imposed by the Bankruptcy Code. *Local Joint Executive Board v. Hotel Circle, Inc.*, 613 F.2d 210, 215 (9th Cir. 1980) (duty to bargain continues); *Shopmen's Local No. 455 v. Kevin Steel Products, Inc.*, 519 F.2d 698,

704 (2nd Cir. 1975) ("obligation to comply with the Labor Act [continues]"); *NLRB v. Bachelder*, 120 F.2d 574, 576 (7th Cir.) (duty to bargain and honor employees' rights to self-organization), *cert. denied*, 314 U.S. 647 (1941). *Cf. In re Bildisco*, 682 F.2d 72, 82-83 (3rd Cir. 1982) (while debtor-in-possession may reject collective bargaining agreement as executory contract, "it may be required to recognize and bargain with the union"), *cert. granted*, 51 U.S.L.W. 3525 (U.S. Jan. 18, 1983) (No. 82-818).

The law in question—the duty to bargain over the effects of a decision to terminate operations—strikes us as critical to protect employees from the ravages of economic dislocation. *NLRB v. Royal Plating & Publishing Co.*, 350 F.2d 191, 196 (3rd Cir. 1965); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108, 115 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966); *Burgmeyer Bros., Inc.*, 254 N.L.R.B. 1027, 1028 (1981). So-called "effects" bargaining provides the Union with an opportunity to bargain in the employees' interest for such benefits as severance pay, payments into the pension fund, preferential hiring if the employer continues operating at other plants, and reference letters with respect to other jobs. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981). We therefore must determine whether imposing a duty upon the Trustee here to bargain over the effects of a decision to terminate operations is consonant with the Trustee's functions under the Bankruptcy Code.

We believe that recognizing a duty to bargain would not unduly impede the Trustee's discharge of his responsibilities. To protect creditors, the Trustee must administer the debtor corporation, 11 U.S.C. § 704(1) (Supp. III 1979), and thereby take responsibility for "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." 11 U.S.C. § 503(b)(1)(A) (Supp. III 1979). Since the obligation to bargain arises only with the Trustee's decision to terminate operations in the overall interests of the creditors, the costs concomitant with that decision properly can be

attributed to the Trustee's efforts to "preserve the estate" on the creditors' behalf. As the bankruptcy court here determined, therefore, costs stemming from "effects" bargaining can be considered administrative expenses and thus fall within the ambit of the Trustee's authority. *Cf. Reading Co. v. Brown*, 391 U.S. 471, 482-84 (1968) (those injured during administration of estate by Trustee entitled to priority claim as administrative expense); *In re W.T. Grant Co.*, 620 F.2d 319 (2nd Cir.) (severance payments to employees entitled to priority as administrative expense), *cert. denied*, 446 U.S. 983 (1980). *But cf. In re Mammoth Mart, Inc.*, 536 F.2d 950, 955 (1st Cir. 1976) (claim for severance pay based upon services rendered before bankruptcy not an administrative expense). While the Trustee's discretion might be constrained by his need for authorization from the bankruptcy court, that limitation can be taken into account in any bargaining. With these considerations in mind, we must determine whether the Trustee's failure to bargain in this case violated §§ 8(a)(5) and 8(a)(1) of the Act.

The Board predicated its § 8(a)(5) conclusion on two findings: first, that the Trustee failed to notify the Union of his decision and, second, that he failed to bargain in the aftermath of the closure. While we disagree with the Board's first ground, we are satisfied that the second ground is sufficient to support a conclusion of failure to bargain.

The Trustee does not dispute that he failed to notify the Union before shutting down the plant. In essence he pleads extenuating circumstances: that he neither knew of the Union's existence, nor had time in any event to notify or bargain before implementing his decision. Irrespective of whether he knew or should have known of the Union's existence,[4] we agree that the emergency

[4] Although we have some difficulty imagining that a Trustee in Bankruptcy would not inquire from the outset whether employees on the payroll were unionized, the ALJ credited Yorke's testimony that he did not know of the Union's presence at the plant.

situation with which he was confronted excused his obligation to notify the Union before closure. The bankruptcy court appointed Yorke trustee on February 4 as the result of allegations that the former management had grossly mismanaged the Company's dwindling assets. On the same day, Yorke visited the plant and saw no employees at work. Soon thereafter, he discovered that the Company did not have the funds to meet the payroll and learned of the Company's overall financial straits. Surely, the Trustee's responsibilities dictated immediate action. The Union could not reasonably be expected to benefit from several days notice before the Trustee's decision went into effect. Indeed, previous Board decisions have recognized that an employer has no duty to notify a union prior to closing in an "emergency" situation. *Kingwood Mining Co.*, 210 N.L.R.B. 844, 844-45 (1974) (grave economic crisis precipitated management decision to terminate mining operations and excused notice); *National Terminal Baking Corp.*, 190 N.L.R.B. 465, 466 (1970) (emergency situation precipitated by theft of Company's two delivery trucks which made continuation of the enterprise impractical). We hold that the Board's implicit conclusion that the Trustee was not faced with an emergency is not supported by substantial evidence.

The Trustee's failure to bargain after the closure about the effects of his decision stands on a different footing. Once operations had been terminated, the emergency situation ended. Three days after the plant shutdown, the Union addressed a letter to Yorke demanding bargaining about the effects on the employees. The letter informed the Trustee that unless he responded within a week, the Union would press charges. The Trustee's response two days later was equivocal. Although he ignored the request for bargaining, he concluded the letter with the sentence, "If there is any further information you desire, I will be happy to furnish same." The Board reasonably could conclude that Yorke's evasive response when confronted by the Union's clear demand for bargaining constituted a failure to bargain in good faith. The Trustee's continued failure to submit to bargaining in the weeks following

closure—even when he decided to recall several employees—bolsters the Board's conclusion. Therefore, while we have held that prior notice was not necessary, we hold that the Trustee's failure to accede to the Union's request for bargaining violated §§ 8(a)(5) and 8(a)(1) of the Act.

III.

This brings us to the propriety of the Board's choice of remedy.

The Trustee strenuously objects to imposition of the type of limited backpay order formulated in *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968). He argues that the order should be set aside as impermissibly punitive under § 10(c) of the Act, 29 U.S.C. § 160(c) (1976), both because the limited backpay order in general is unjustified in the bankruptcy context and because the minimum two weeks of backpay ordered by the Board exacts too great a cash concession from the Trustee. The *Transmarine* type order issued by the Board requires the Trustee to pay the seven employees their normal daily wage from five days after the Board's decision until an agreement or impasse over effects bargaining is reached, as long as the total is not less than an amount equivalent to two weeks pay and not greater than an amount the employees would have received had they worked until the time they found alternative employment. Since we believe that the Trustee misconceives the nature of the remedy, we enforce the Board's order.

The Trustee first contends that the *Transmarine* remedy in any form is unwarranted in the bankruptcy context. He argues that once a company is bankrupt, there can be no meaningful bargaining—in other words, if the Company has no assets, it cannot make concessions. Arguably, a union in that situation has no bargaining power because the services of its employee members no longer are required. The Supreme Court in *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 9-13 (1940), emphasized that,

while the Board is given wide leeway in fashioning remedies, the remedy chosen must "achieve the remedial objectives which the Act sets forth," *id.* at 12, and must not punish the employer for its violations. Under *Transmarine*, however, the bankrupt employer may be forced to pay more than he would have even if bargaining had taken place and the conditional backpay remedy in those situations would be punitive.

The Trustee's argument here, however, that the conditional backpay requirement is unwarranted under all circumstances is belied by the facts of this case. Although the Company was bankrupt, at the time of closure it still had approximately $6,000,000 worth of unliquidated assets. Furthermore, the Company later found it necessary to recall three bargaining unit employees to help liquidate the Company. While the Trustee may have been required to obtain the bankruptcy court's authorization before granting concessions, the Trustee could have bargained subject to that approval. The Board reasonably could conclude that, had the Trustee bargained in February and March, the Union would have had some leverage in obtaining concessions. The purpose of the limited backpay requirement in such circumstances is not to punish, but to create an incentive for the Company to bargain in good faith. Ensuring meaningful bargaining comports with the primary objective of the Act. *Morrison Cafeterias Consolidated, Inc. v. NLRB*, 431 F.2d 254, 258 (8th Cir. 1970). We therefore hold that the Board's choice of the limited backpay remedy in the instant case was well within the broad remedial discretion granted by the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189-200 (1941).

Although we find it a close question, we believe that requiring a minimum of two weeks backpay likewise serves to effectuate the remedial purpose of the Act. We recognize that the ability of the Trustee to make cash concessions at the time of closure was limited, and we are aware that the Union already has enjoyed some of the benefit it could have hoped to attain from bargaining—the recall of three unit employees to assist in the liquida-

tion. Nevertheless, three years after the plant shutdown, the Union can hardly hope to attain the same benefits from bargaining that might have helped ease its employees' transition into a new line of work had bargaining taken place immediately upon closure. The Board's adjustment takes into account the changed circumstances since the closing, and two weeks of backpay for seven employees represents an insubstantial amount in comparison to the assets that the Company then held. Moreover, the minimum pay period may well discourage premature impasse in the bargaining that is to ensue. We therefore conclude that imposing the minimum backpay period is not punitive and falls within the discretion granted the Board.

We find, however, that we must comment on one aspect of the future compliance proceeding. The Board claims that the Trustee's continued refusal to bargain after the Board issued its order has expanded his liability well beyond the two week period. The Board reasons that, since the Trustee could have bargained immediately after the decision and thereby have minimized his monetary obligations, he now must be saddled with the full $55,000 liability set aside by the bankruptcy court. We find the Board's argument unpersuasive.

To evaluate the Board's argument, we turn for guidance to the analogy found in an employer's refusal to bargain with a newly certified union to obtain review of the Board's certification decision. In *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970), *enforced sub nom. I.U.E. v. NLRB*, 449 F.2d 1058 (D.C. Cir. 1971), the Board held that it would not order an employer to make employees whole for the time period during which the employer refused to bargain with the Union after certification. Since a refusal to bargain is the only statutory method available for an employer to challenge the Board's certification, the Board concluded that "where the wrong in refusing to bargain is, at most, a debatable question, though ultimately found a wrong, the imposition of a large financial obligation on such a respondent may come close to a form of punishment for having elected to pursue a

representation question . . . to the courts." *Id.* at 109.[5] Reviewing courts have approved the Board's policy decision that "make whole" orders should be issued only when the employer has no "debatable" defense for its refusal to bargain. *NLRB v. Food Store Employees Local 347 (Heck's Inc.)*, 417 U.S. 1 (1974); *United Steelworkers v. NLRB*, 430 F.2d 519, 522 (D.C. Cir. 1970) (Board warranted in refusing to grant such a remedy when the employer "desired only to obtain an authoritative determination of the validity of the Board's decision."). The Board consistently has declined to issue make whole remedies unless the employer's defense for refusing to bargain is patently frivolous. *Heck's Inc.*, 215 N.L.R.B. 765, 768 (1974).

We find such reasoning to have equal force in the instant case. Refusing to bargain was the only means available to the Trustee to challenge what he considered an erroneous decision. Computing the sliding backpay requirement from the date of the Board's decision in our view imposes too harsh a condition on the employer's ability to obtain judicial review under § 10(f) of the Act, 29 U.S.C. § 160(f) (1976).[6] The Board has asserted no

[5] The Board in *Ex-Cell-O Corp.* also premised its conclusion on the Supreme Court's admonition in *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), that the Board's remedial power does not extend to compelling an agreement. In the Board's view, assessing financial liability for failure to bargain impermissibly assumed that the parties would have reached *some* agreement. 185 N.L.R.B. at 109-10.

[6] We note that a conditional backpay award differs substantially from the more conventional backpay order. The former is intended to create incentive for bargaining; the ultimate monetary liability is to be assessed contingent on the length of time needed to conclude an agreement or reach impasse. The straight backpay order, on the other hand, is intended to remedy acts that have already taken place; there is nothing contingent about it. When an employer challenges a backpay order, it does not lose anything—the interest on any ultimate award will be balanced roughly by its use of the money in the interim. If the backpay award were assessed retroactively

(Footnote continued on following page)

claim that the Trustee's refusal to bargain was other than "debatable." Indeed, until today's decision in the instant case, we know of no case in which an appellate court has addressed the Trustee's duty to bargain about the effects of his decision to terminate operations. We therefore hold that the Board cannot penalize the employer for challenging a *Transmarine* order in good faith by imposing monetary liability retroactively to its refusal to bargain after the Board's decision. The *Transmarine* period therefore commences from the date of this opinion.

Our ruling that the *Transmarine* order cannot be computed retroactively may conceivably give employers an incentive to disobey Board orders until review can be obtained. Nevertheless, while we eschew such dilatoriness, delay to some extent is built into the structure of the National Labor Relations Act. Moreover, if the employer can proffer no "debatable" defense for its refusal to comply with the Board's *Transmarine* order, then liability may be computed from the date of the Board decision.

To summarize: we hold that substantial evidence supports the Board's finding of violations of §§ 8(a)(5) and 8(a)(1); in that respect we deny the Trustee's petition to review and to set aside the Board order, and we grant the Board's cross-application to enforce. Our enforcement of the Board's order, however, is conditioned upon its computation of the *Transmarine* backpay period from the date of this opinion.

No costs.

MODIFIED AND, AS MODIFIED, ENFORCED.

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[6] *continued*
against an employer in the instant situation, however, the employer would be punished severely by challenging the order: the employer's liability would increase with each passing day.

COFFEY, *Circuit Judge*, dissenting. I agree with the majority's holding that the bankruptcy trustee acted lawfully in terminating Seeburg Corporation's operations without prior consultation with the Union. However, I respectfully dissent as I disagree with the conclusion of the National Labor Relations Board and the majority that the Bankruptcy Trustee Yorke committed an unfair labor practice by refusing to bargain in good faith with the Union subsequent to the termination of the corporation's operations. This case raises vitally important questions concerning the relative jurisdictional roles of the bankruptcy court and the NLRB in the context of Chapter XI bankruptcy proceeding, questions of critical importance not only to the respective tribunals but to future litigants as well as the entire bench and bar. The majority's rote and mechanistic application of principles that may be appropriate in the normal employer-employee relationship ignores the fact that this case arises in the context of a Federal Bankruptcy Chapter XI proceeding. Furthermore, the majority fails to respect the severe limitations imposed on the authority of Chapter XI Bankruptcy Trustees, thus encroaching on the Bankruptcy Court's exclusive jurisdiction over Chapter XI bankruptcy proceedings. In failing to adequately consider the limited powers of a Trustee in bankruptcy, the majority's decision undermines Congress's goal in enacting Chapter XI of the Federal Bankruptcy Act, that of preserving the viability of financially troubled business entities whenever possible. *See, In re Huntington, Ltd.*, 654 F.2d 578 (9th Cir. 1981). The majority's decision makes virtually impossible the Trustee's "thankless task of determining who should share the losses incurred by an unsuccessful business and how the values of the estate should be apportioned among creditors . . . ." S. Rep. No. 95-989 (95th Cong. 2nd Sess. 10 *reprinted in* 1978 U.S. Code Cong. & Ad. News, 5787, 5796) and, furthermore violates Congress's purpose, expressed in the National Labor Relations Act, of achieving industrial harmony and prosperity by "recogniz[ing] the rights of all interested parties in labor relations . . .

be[ing] scrupulously fair to each—the employer, the employees, and the public." H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947) *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 295.

I.

To facilitate the goals of Chapter XI, Congress has vested the bankruptcy court with exclusive jurisdiction over the entire Chapter XI bankruptcy proceedings, and has delegated extremely limited authority to the Trustee to administer the debtor's estate. The Chapter XI Trustee, an officer of the bankruptcy court, derives his authority exclusively from the Bankruptcy Act, and his power to act independently of the bankruptcy court is extremely circumscribed. The court in *In Re Transatlantic and Pacific Corp.*, 216 F.Supp. 536, 542 (S.D.N.Y. 1963) recited:

> "The Trustee's activities are specifically circumscribed by the Bankruptcy Act. His actions must be compatible with the bankrupt's best interests as well as the interest of the bankrupt's creditors. 2 Collier, Bankruptcy 1737 (Moore Ed. 1962). *The contention that the Trustee possesses the same unlimited powers . . . as did the bankrupt before the bankruptcy is wholly without merit.*" (emphasis added).

More recently, the Ninth Circuit stated:

> "A debtor in possession or a receiver under Chapter XI of the Bankruptcy Act is, in a real sense, not the same entity as the pre-bankruptcy company. It is '[a] new entity . . . with its own rights and duties, subject to the supervision of the bankruptcy court.'
>
> * * *
>
> *'[i]t is well settled bankruptcy law that on important decisions, whatever their character, the Trustee must get the court's approval.'"*

Local Joint Executive Board v. Hotel Circle, 613 F.2d 210, 213, 216 (9th Cir. 1980) (emphasis added).

Viewing the facts of this case in their proper context, that of a Chapter XI bankruptcy proceeding, it is clear that the Trustee Yorke acted reasonably under the circumstances. Yorke was appointed Trustee of a corporation in dire financial straits, with its financial position deteriorating hourly. Yorke recognized that swift action was necessary if he was to have even a glimmer of hope of fulfilling his duty of protecting the interests of the corporation's creditors by salvaging even a small part of the corporation's assets and that the only reasonable course of action was to expeditiously close down the plant. He promptly petitioned the bankruptcy court and obtained authorization to terminate the company's operations and lay off the remaining employees. The Union responded to the Trustee's court-approved action taken to protect the best interests of all the corporation's creditors, with the following letter:

"Gentlemen:

"The undersigned represents Local 743 IBT. The union has a collective bargaining agreement covering the employees of Seeburg Corporation. As you are well aware, this agreement governs the wages, hours and working conditions of those employees.

It is apparent to the undersigned that the rights of these employees are being seriously undermined. It has come to our attention that numerous employees whom we represent are being transferred to do work for different companies within your corporate structure and that work, covered by our contract, is being performed elsewhere. It has also come to our attention that the remaining employees of Seeburg Corp. have been locked out as of February 11, 1980. . . .

This is also to demand that an immediate meeting be set up so that we can discuss the decision and effects that your action has on our bargaining unit employees. . . .

What were the reasons that the Seeburg employees were denied the ability to come to work

on February 11, 1980. Will they be transferred to other payrolls of either Choice Vend, XCor or any other companies under those companies' control? What has happened to the Seeburg supervisory personnel? Have they been transferred to either Choice Vend, Xcor or any companies under those companies' control?

Third, are you aware of any prospective purchasers of the Seeburg Corporation? If so, please identify their names and addresses. If a sale or other disposition of the Seeburg Corporation is contemplated, please inform us what will happen to the existing facility, such as the property, fixtures, machinery, trucks, furniture, etc.? In particular, we would desire to know if there will be a sale or transfer to other companies within the Xcor Corporation. If there will be acquisition by another Xcor Corporation company, we would like to know the intentions of Xcor concerning future employment of the managerial, supervisory, or other non-union employees who have been working for Seeburg. This would also include any transfer of employees to Choice Vend. Further, we would desire to know what will happen to existing accounts receivable and payable, existing lease agreements or contracts, other existing liabilities as well as goodwill. We would further desire to know the disposition of any existing commitments to customers or creditors. We are particularly interested in knowing what will be the disposition of work done by Seeburg employees covered by our collective bargaining agreement. Will that work be transferred to any other entity within the Xcor Corporation or Choice Vend?

Please be advised that we expect our collective bargaining agreement to be abided by and we expect a response to this letter by the close of business February 22, 1980. Failure to answer this letter by the time indicated will necessitate the institution of the proper proceeding."

Trustee Yorke responded to this letter stating:

> "I am in receipt of your letter dated February 15, 1980. Please be advised that the u-dersigned was appointed Trustee on February 4, 1980. Be further advised that the Trustee discontinued the operation of the business and has no employees.
>
> "In reply to your questions, Excor is a publicly owned company. Consolidated Entertainment owns all the stock of the Seeburg Corporation. I do not know who owns Choice Vend. I do not know if Choice Vend or Excor have any collective bargaining agreements with labor organizations.
>
> *"If there is any further information you desire, I will be happy to furnish same."*

(Emphasis added).

The Union's "shotgun" letter demanded that Yorke, the trustee of a multimillion dollar corporation appointed less than two weeks earlier, provide extensive and detailed information such as "what will happen to existing accounts receivable and payable, existing lease agreements or contracts, other existing liabilities as well as goodwill." It is absurd to expect Yorke to provide on such short notice the particularized data and accounting information requested by the Union, information which was certainly not available to Yorke, even during this computerized age, at this early stage of the Chapter XI proceedings.

Contrary to the National Labor Relations Board's conclusion, I would hold that the Trustee's letter could not under any circumstances be interpreted as a refusal to bargain; rather, the letter plainly and unambiguously concluded by stating: "If there is any further information you desire, I will be happy to furnish same." Thus, with those words, the Trustee Yorke issued an open-ended invitation to the Union to contact him if they desired any further information, an invitation which the union rejected. To hold that Yorke's letter was anything other than an open-ended invitation to the Union for further

dealings is to "stifle the promptings of common sense." *Planned Parenthood Ass'n of Chicago v. Kempiners*, 700 F.2d 1115, 1137 (7th Cir. 1983). The Trustee's court-approved termination of operations at the plant and responding to the Union's requests as he did were, in fact, all that a bankruptcy Trustee could have been expected to do under the circumstances; any further action by the Trustee Yorke would have been inconsistent with his limited powers as a bankruptcy Trustee since, as discussed more fully below, a bankruptcy Trustee absent prior court approval is without authority (1) to make important decisions on behalf of the bankrupt corporation; or (2) to adopt an executory contract, such as a collective bargaining agreement.

It is clear that the Trustee was not authorized to bargain with the Union without first receiving the approval of the Court. In light of the fact that "it is well settled bankruptcy law that on important decisions, whatever their character, the Trustee must get the court's approval" *Hotel Circle*, 613 F.2d at 210, bargaining with a Union over the effects of the plant closing (e.g. severance pay, payments into the pension fund, etc.) obviously would entail making "important decisions" affecting the bankrupt corporation. Thus, the Trustee would be engaging in an exercise in futility were he to meet with the Union in an attempt to bargain, as he was without authority to bind the bankrupt corporation absent specific prior approval of the bankruptcy judge. If, on the other hand, the Trustee did purport to bind the bankrupt corporation, he would breach his duty as an officer of the court by acting on "important matters" without prior court approval.

Yorke was without authority to immediately accede to the Union's request to bargain, since the powers of the Trustee are limited as "it is improper for a Trustee to assume executory contracts on his own responsibility." 4A Collier on Bankruptcy, Paragraph 70-43(5) at 531 (14th Ed. 1976); "the assumption . . . of executory agreements affects the outcome of the chapter [XI]

proceeding and should proceed under the supervision of the court." *Hotel Circle*, 613 F.2d at 216. The limitation on the Trustee's power to assume executory contracts becomes especially significant in this context as a collective bargaining agreement between a union and a bankrupt corporation is an executory contract. *In re Brada Miller Freight System*, 702 F.2d 890 (11th Cir. 1983); *In re Bildisco*, 682 F.2d 72 (3rd Cir. 1982), *cert. granted*, 51 U.S.L.W. 3525 (U.S. Jan. 18, 1983); *Hotel Circle*, 613 F.2d at 213; *Shopman's Local 455 v. Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975). Furthermore, where a successor employer, such as a Chapter XI Trustee, has chosen to act in a conformance with the terms of a collective bargaining agreement, that successor may be found to have assumed the collective bargaining agreement. *cf. NLRB v. Burns International Security Service, Inc.*, 406 U.S. 272, 291 (1972). Thus, if the Trustee had actually instituted bargaining with the Union without first securing the court's approval, he may have been deemed to have tacitly assumed the collective bargaining agreement by acceding to its terms.

Nevertheless, the Trustee did not close the door on the Union's request to bargain. Rather, Yorke specifically informed the Union that he had been appointed bankruptcy Trustee of the corporation and told the Union "if there is any further information you desire, I will be happy to furnish same." The Union, fully aware that Yorke was acting as bankruptcy Trustee of the corporation, chose to blatantly ignore this invitation for further dealings, even though, as a matter of law, the Union, like all other citizens dealing in bankruptcy matters, is charged with knowledge of the limitations on the Trustee's powers to act without court approval. "Parties dealing with a receiver are charged with knowledge of the extent of any restriction upon his authority." *Hotel Circle*, 613 F.2d at 210; *In re Yellow Transit Freight Lines*, 207 F.2d 602, 606 (7th Cir. 1953). Despite their knowledge that the corporation was in receivership and the limitations on the Trustee's powers, which the law properly holds them to have, the Union ignored, without

even so much as the courtesy of a phone call or a letter, the Trustee's invitation to contact him for more information. Instead, a mere seventy-two hours after Yorke wrote his letter inviting the Union to contact him for further information, the Union filed an unfair labor practice charge with the NLRB without making any attempt to deal directly with Yorke. It is clear that it was the Union, and not the Trustee, who acted in bad faith in choosing to ignore the limitations on Yorke's power to act without the court's prior approval. The NLRB, despite their supposed legal expertise, compounded the problem by ignoring the restrictions on the Trustee's power to act without prior court approval and taking the myopic and short-sighted view that the Trustee should be held to the same standards as a financially sound corporation.

The appropriate course of action for the Union to have followed in response to Yorke's invitation for further dealings would have been to respond to Yorke's letter of invitation and then the Trustee could go to the Bankruptcy Court to seek authorization to bargain. The Union would be free to appear before the Bankruptcy Court as well, since a Bankruptcy Court has broad discretion to permit interested parties to appear before it and be heard. *In re Penn-Dixie Industries, Inc.*, 9 B.R. 936 (SD N.Y. 1981); *In re Citizen's Loan & Thrift Co.*, 7 B.R. 88 (Banks N.D. Iowa 1980). If the Bankruptcy Court refused to allow the Trustee to bargain, or if the Trustee subsequently failed to bargain in good faith, *then, and only then*, should the Union be permitted to bring an unfair labor practice charge before the NLRB. Undue encroachment by the NLRB in the Bankruptcy Court's exclusive jurisdictional sphere would be avoided, or at least minimized, by affording the Bankruptcy Court an opportunity to act within their proper realm *before* instituting an unfair labor practice proceeding with the NLRB. The course of action adopted by the Union and the NLRB in this case, on the other hand, fails to respect the authority of the Bankruptcy Court and the severe limitations on a bankruptcy Trustee's powers. In sanctioning the Union's actions, the majority's decision will inevitably lead to

jurisdictional conflicts between two separate federal tribunals, the Bankruptcy Court and the NLRB.

II.

This is a case of first impression involving two vitally important, though conflicting, national policies: the revitalization of financially troubled business enterprises and the regulation of labor-management relations through collective bargaining. As a case of first impression, this court's decision will have a direct impact on the resolution of future cases pertaining to the scope of a Chapter XI bankruptcy Trustee's duty to bargain with the bankrupt corporation's unionized employees. Therefore, I believe it is essential for this court to achieve an equitable balance between the goals of revitalizing financially troubled corporations and encouraging harmonious labor relations, a balance which will not frustrate the financial recovery of corporations involved in Chapter XI bankruptcy proceedings. I believe the majority opinion in this case fails to achieve this equitable balance, and rather takes a myopic and short-sighted view of the critical interests involved in Chapter XI bankruptcy proceedings. As the Eleventh Circuit recently stated:

> "We do not contemplate that Congress intended the ultimate fate of a corporation under Chapter XI to rest so largely in the hands of the company's protected employees. There simply exist too many other critical interests, those of other employees, creditors, and shareholders, the protection of which provides the stimulus for the bankruptcy laws, for this Court to conclude that the collective bargaining agreement was meant to hold a stranglehold position . . . ."

In re Brada Miller Freight System, 702 F.2d 890, 897 (11th Cir. 1983).

I dissent as I believe the majority's decision foists an unreasonable burden on business enterprises involved in Chapter XI bankruptcy proceedings. It is the height of

absurdity for the NLRB to exert a fatal chokehold on Congress's specific intent to allow mortally wounded businesses a chance to make a financial comeback at a time when our basic industries are struggling to survive. Courts not only have the obligation to interpret and apply the law, but must also continue to be aware of economic reality while showing fiscal responsibility in their decisions and must not decide cases in an economic vacuum.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 26, 1983.

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, Jr., Circuit Judge**
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge**
Hon. JOEL M. FLAUM, Circuit Judge

NATHAN YORKE, TRUSTEE IN BANKRUPTCY, THE SEEBURG CORPORATION,

Petitioner,

No. 82-1334

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

WAREHOUSE, MAIL ORDER, OFFICE, PROFESSIONAL AND TECHNICAL EMPLOYEES UNION, LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor.

Petition for Review of Order of the National Labor Relations Board.

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* The Honorable William H. Timbers of the Second Circuit, sitting by designation.

** The Honorable Wilbur F. Pell, Jr. and the Honorable John L. Coffey voted to grant the rehearing *en banc*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by counsel for the petitioner in the above-entitled cause, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing *en banc*. A majority of the judges on the original panel* have voted to deny the petition. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

STATUTES AND RULES INVOLVED

Section 1104(a)(1) of the Bankruptcy Act, 11 U.S.C. § 1104(a)(1) provides:

"(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or"

Section 501 of the Bankruptcy Act, 11 U.S.C. § 501 provides:

"(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

(b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

(d) A claim of a kind specified in section 502(f), 502(g), 502(h) or 502(i) of this title may be filed under subsection (a), (b), or (c) of this section the same as if such claim were a claim against the debtor and had arisen before the date of the filing of the petition."

Section 502 of the Bankruptcy Act, 11 U.S.C. § 502 provides:

"(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in

interest, including a creditor of a partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor, and unenforceable against property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) such claim may be offset under section 553 of this title against a debt owing to the debtor;

(4) if such claim is for a tax assessed against property of the estate, such claim exceeds value of the interest of the estate in such property;

(5) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(6) the claim is for a debt that is unmatured on the date of the filing of the petition, and that is excepted from discharge under section 523(a)(5) of this title;

(7) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed,[1] or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(8) if such claim is for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) the unpaid compensation due under such contract without acceleration, on the earlier of such dates; or

(9) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor.

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, fixing or liquidation of which, as the case may be, would unduly delay the closing of the case; or

(2) any right to an equitable remedy for breach of performance if such breach gives rise to a right to payment.

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[1] So in original. Probably should read "repossessed".

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)(1) Notwithstanding subsections (a) and (b) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on, or has secured, the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance of such claim for reimbursement or contribution; or

(C) such entity requests subrogation under section 509 of this title to the rights of such creditor.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or

disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522(i), 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(6) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) Before a case is closed, a claim that has been allowed may be reconsidered for cause, and reallowed or disallowed according to the equities of the case."

Section 507 of the Bankruptcy Act, 11 U.S.C. § 507 provides:

"(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(2) Second, unsecured claims allowed under section 502(f) of this title.

(3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance and sick leave pay—

(A) earned by an individual within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) to the extent of $2,000 for each such individual.

(4) Fourth, allowed unsecured claims for contributions to employee benefit plans—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by such plan multiplied by $2,000; less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(5) Fifth, allowed unsecured claims of individuals, to the extent of $900 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(6) Sixth, allowed unsecured claims of governmental units, to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts—

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (3) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement of classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if,

notwithstanding such protection, such creditor has a claim allowable under subsection (a)(1) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax shall be treated the same as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(3), (a)(4), (a)(5), or (a)(6) of this section is not subrogated to the right of the holder of such claim to priority under such subsection."

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) provides:

"(a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) provides:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances

to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

Section 554 of the Administrative Procedures Act, 5 U.S.C. § 554 provides:

"(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue; unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant

to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."

Section 557(c)(A) of the Administrative Procedures Act, 5 U.S.C. 557(c)(A) provides:

"(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinated employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and"

No. 83-810

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATHAN YORKE, TRUSTEE IN BANKRUPTCY, THE SEEBURG CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain about the effects of his decision to cease operations.

2. Whether, in the circumstances of this case, the Board's limited back pay remedy was reasonable.

3. Whether the complaint alleged, and the Board found, the violation that the court of appeals identified.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 70a-94a) is reported at 709 F.2d 1138. The decision and order of the National Labor Relations Board (Pet. App. 17a-50a) is reported at 259 N.L.R.B. 819.

JURISDICTION

The judgment of the court of appeals (Pet. App. 69a) was entered on June 1, 1983. A petition for rehearing was denied on August 26, 1983 (Pet. App. 95a-96a). The petition for a writ of certiorari was filed on November 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Seeburg Corporation[1] and the Union[2] were parties to a collective bargaining agreement that was effective from November 1977 to September 1980 (Pet. App. 20a). On October 19, 1979, Seeburg filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et. seq.* (Pet. App. 42a). On February 4, 1980, petitioner Nathan Yorke was appointed by the bankruptcy court as trustee for Seeburg and assumed full control of the corporation (*id.* at 43a). Following a creditors' meeting held on February 8, in which he learned that Seeburg's liabilities exceeded its assets, petitioner applied to the bankruptcy court for authorization to terminate operations. On February 11, the bankruptcy court granted petitioner's application; later that day, petitioner closed down the plant and discharged the seven remaining employees.[3] The Union received no notice of this action. Pet. App. 43a, 24a.

On February 15, 1980, the Union wrote a letter to both petitioner and Seeburg requesting, inter alia, a meeting to discuss the decision and effects of the cessation of operations. On February 25, petitioner responded to the Union's letter, stating that as trustee he had discontinued the operation of the business and no longer employed any employees. Pet. App. 25a-26a, 43a, 73a-75a. On February 28, the Union filed unfair labor practice charges against petitioner

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[1]Seeburg Corporation and Seeburg Service Parts Co., respondents in the Board proceeding, were found by the Board to constitute a single integrated business enterprise and a single or joint employer under the Act (Pet. App. 20a). This finding was not challenged in the court of appeals. The two companies are referred to herein as "Seeburg".

[2]Warehouse, Mail Order, Office, Professional and Technical Employees Union, Local 743, International Brotherhood of Teamsters.

[3]The bulk of Seeburg's work force was laid off prior to petitioner's appointment as trustee. These layoffs were accomplished in accordance with the collective bargaining agreement. Pet. App. 22a, 42a-43a.

and Seeburg, alleging, inter alia, that petitioner had failed to bargain with the Union about the effects on employees of the decision to terminate operations (*id.* at 18a).

On April 10, 1980, petitioner and Seeburg's Chairman of the Board met with the Union and informed it that petitioner planned to recall two or three unit employees to assist Seeburg in a sale of parts the bankruptcy court had authorized. The Union agreed, and petitioner accordingly recalled three unit employees. Petitioner resumed operations with the three employees, selling parts from approximately April 10, 1980, through July 28, 1980. On the latter date, petitioner's plan of arrangement, which provided for a liquidation sale to Stern Electronics, was confirmed by the bankruptcy court, and petitioner finally terminated operations. Pet. App. 27a, 28a, 43a-44a.[4]

2. The Board, upholding the decision of the administrative law judge, found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(5) and (1), by terminating operations without prior notice to the Union and by failing to bargain with the

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[4]At the July 28 hearing, the bankruptcy court ruled (Pet. App. 59a) that the Board's claim for back pay (see pages 4-5, *infra*) was an administrative expense entitled to first priority under the Bankruptcy Code. As of that date, the Board's proof of claim amounted to $55,000. Under the reorganization plan approved by the bankruptcy court, Seeburg and the purchaser in liquidation, Stern Electronics, agreed to set aside $49,000 of the assets for back pay in case Seeburg should ultimately be found liable. Stern Electronics agreed to provide an additional $6,000 for any back pay liability that might be assessed. Pet. App. 44a.

The bankruptcy court also enjoined the Board from processing the unfair labor practice case and directed that the unfair labor practice issue be tried instead by the bankruptcy court (Pet. App. 61a-63a). On appeal, the United States District Court for the Northern District of Illinois vacated the injunction against the Board and directed the bankruptcy court to refrain from hearing the unfair labor practice charges (*id.* at 65a-68a).

Union over the effects of its decision to terminate operations (Pet. App. 41a-50a, 17a-40a). The administrative law judge explained that a trustee in bankruptcy has a duty to comply with the Act, including the duty to bargain and that "[t]his duty is not relieved by the employer's bankruptcy, and any consequent belief * * * that it would be financially unable to meet any of the union's bargaining demands" (*id.* at 32a) (emphasis omitted).

The Board ordered the trustee to bargain, upon request by the Union, with respect to the effects on unit employees of the decision to terminate operations on February 11, 1980, to reduce to writing any agreement reached as a result of such bargaining, and to mail an appropriate notice to each unit employee (Pet. App. 38a). The Board accompanied its order to bargain with a limited back pay remedy for the seven employees who were on the payroll on February 11, 1980. The order directed petitioner to pay the wages of these employees from five days after the date of the Board's decision until (1) the parties reached agreement; (2) the parties reached impasse in bargaining; (3) the Union failed to request bargaining within five days of the Board decision; or (4) the Union failed to bargain in good faith, provided that "in no event shall the sum paid to any of these employees exceed the amount each would have earned as wages from the time [Seeburg] discontinued its operations to the time each secured equivalent employment elsewhere, or the date on which [Seeburg] shall have offered to bargain, whichever occurs first; provided, however, in no event shall this sum be less than such employees would have earned for a 2-week period at the rate of their normal wages when last in [Seeburg's] employ" (Pet. App. 46a-47a). The Board explained (*id.* at 46a) that a bargaining order alone could not fully remedy the unfair labor practices because Seeburg's employees "were denied an opportunity to bargain through their exclusive representative at a time when

such bargaining would have been meaningful. Meaningful bargaining cannot now be assured until some measure of economic strength is restored to the Union." The Board stated (*ibid.*) that the back pay it ordered was designed to make the seven employees whole "for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for [Seeburg]."

3. The court of appeals (Coffey, J., dissenting) upheld the Board's finding that petitioner violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union about the effects of the decision to terminate operations (Pet. App. 70a-94a).[5] The court stated that a "Trustee in Bankruptcy, like any other employer, must abide by the labor laws, as long as they prescribe conduct consistent with the duties imposed by the Bankruptcy Code" (*id.* at 76a). The court concluded that recognition of a duty to bargain would not unduly impede a trustee's discharge of his reponsibilities under the Bankruptcy Code (Pet. App. 77a). Moreover, "[s]ince the obligation to bargain arises only with the Trustee's decision to terminate operations in the overall interests of the creditors, the costs concomitant with that decision properly can be attributed to the Trustee's efforts to 'preserve the estate' on the creditors' behalf" (*id.* at 77a-78a). The court concluded that "[w]hile the Trustee's discretion might be constrained by his need for authorization from the bankruptcy court, that limitation can be taken into account in any bargaining" (*id.* at 78a).

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[5]The court of appeals disagreed with the Board's conclusion that petitioner violated Section 8(a)(5) and (1) of the Act by failing to *notify* the Union of his decision to terminate operations. The court found that "the emergency situation with which [petitioner] was confronted excused his obligation to notify the Union before closure" (Pet. App. 78a-79a).

The court of appeals rejected petitioner's challenge to the Board's limited back pay award.[6] The court disagreed with the contention that, in the circumstances of this case, petitioner would have been unable to make concessions because Seeburg had no assets. The court explained (Pet. App. 81a):

> Although the company was bankrupt, at the time of closure it still had approximately $6,000,000 worth of unliquidated assets. Furthermore, the Company later found it necessary to recall three bargaining unit employees to help liquidate the Company. While the Trustee may have been required to obtain the bankruptcy court's authorization before granting concessions, the Trustee could have bargained subject to that approval. The Board reasonably could conclude that, had the Trustee bargained in February and March, the Union would have had some leverage in obtaining concessions. The purpose of the limited back pay requirement in such circumstances is not to punish, but to create an incentive for the Company to bargain in good faith.

The court also rejected petitioner's contention that the minimum two-week back pay award to the seven employees served no legitimate function and held that such a remedy was within the Board's discretion. The Court noted (*id.* at 82a) that "three years after the plant shutdown, the Union can hardly hope to attain the same benefits from bargaining that might have helped ease its employees' transition into a new line of work had bargaining taken place immediately

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[6]The court of appeals disagreed with the Board's conclusion that the remedial order should be computed retroactive to the date of the Board's order. It modified the Board's order so that petitioner's back pay obligation would begin on the date of the court's opinion rather than on the date of issuance of the Board's order. Pet. App. 82a-84a. The court of appeals entered a stay of its judgment until November 14, 1983, the date on which the petition for a writ of certiorari was filed.

upon closure." The court concluded that the Board had taken into account changed circumstances, that the amount of back pay the Board ordered represented a small amount in comparison to the assets Seeburg held, and that the minimum pay period might help to discourage premature impasse in the bargaining ordered by the Board (*ibid.*).

Judge Coffey dissented (Pet. App. 85a-94a). In his view, a bankruptcy trustee may not bargain with a union over the effects of a closing without first securing the permission of the bankruptcy court. Therefore, petitioner could not be said to have violated the duty to bargain about the effects of the closing because his response to the Union's bargaining demand was consistent with his obligation to obtain the permission of the bankruptcy court before entering into negotiations (id. at 89a-90a).

ARGUMENT

1. Petitioner contends (Pet. 7) that the decision of the court of appeals conflicts with the bankruptcy laws because it requires "that the Trustee * * * yield his duties under the Bankruptcy Laws and bargain and grant to ex-employees the $55,000 in funds which remain in the estate." That contention is without merit.

Where the requirements of the National Labor Relations Act conflict with the requirements of the Bankruptcy Code, the two must be harmonized. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). But here the court of appeals found no conflict between the requirements of the Act and petitioner's duties under the Code. Indeed, every court of appeals that has considered the question has agreed that a trustee in bankruptcy, like any other employer, must abide by the Act and bargain with the exclusive bargaining representative of its employees. See *In re Bildisco*, 682 F.2d 72, 83 (3d Cir. 1982), cert. granted, Nos. 82-818 and 82-852 (Jan. 17, 1983); *Shopmen's Local Union No. 455* v. *Kevin Steel*

Products, Inc., 519 F.2d 698, 704 (2d Cir. 1975); *In re Brada Miller Freight System, Inc.*, 702 F.2d 890, 894-895 (11th Cir. 1983); *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F.2d 210, 215 (9th Cir. 1980).

The court of appeals correctly concluded that there is no inconsistency between petitioner's fiduciary obligations as trustee under the Bankruptcy Code and his duty to bargain with the Union about the effects of his termination of operations. The Act required petitioner to bargain with the Union about the effects of the closing at a time when bargaining might have been meaningful.[7] It did not require petitioner to agree to any measures that would have been in derogation of his fiduciary duties to creditors. As the court of appeals recognized (Pet. App. 78a), "[w]hile the Trustee's discretion might be constrained by his need for authorization from the bankruptcy court, that limitation can be taken into account in any bargaining."[8]

Moreover, nothing in the Board's order requires petitioner to grant economic concessions to the employees; nor did the Board fault petitioner for failing to grant economic concessions in the past. The amount of $55,000, to which

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[7]The court of appeals noted (Pet. App. 77a) that "effects" bargaining could include subjects such as severance pay, payments into a pension fund, preferential hiring at an employer's other locations, and provision of reference letters.

[8]Contrary to the suggestion in the dissent (Pet. App. 90a-91a), this case does not involve petitioner's assumption of a collective bargaining agreement. The statutory duty to bargain arises from the Union's status as the bargaining representative of the employees and does not depend on the existence of a collective bargaining agreement. Accordingly, the issue presented in *NLRB* v. *Bildisco and Bildisco, Debtor-In-Possession*, and *Local 408, International Brotherhood of Teamsters* v. *NLRB*, Nos. 82-818 and 82-852 (argued Oct. 11, 1983), concerning the standards for rejection of collective bargaining agreements in bankruptcy courts and the obligations of debtors-in-possession and trustees to adhere to such agreements, is not presented here.

petitioner refers, does not represent a sum designed to cover any bargaining concessions. Rather, it is an amount the bankruptcy court set aside after the Board, as a creditor under the Code, established its proof of claim based on petitioner's potential liability under the Act for his unlawful refusal to bargain. The bankruptcy court found (Pet. App. 59a) that the Board's claim, if proven, would be for damages for injury to employees and would be one of the "actual necessary costs and expenses of preserving the estate" within the meaning of 11 U.S.C. 503(b)(1)(A) and thus an "administrative expense" entitled to first priority under 11 U.S.C. 507(a)(1). In fact, the court of appeals' modification of the Board's order allowed petitioner to reduce his *actual* liability far below $55,000 by holding the minimum back pay to a two-week period. See Pet. App. 82a-84a.[9]

Petitioner urges (Pet. 8-9) that the dissent's suggestion that a trustee be required to obtain the permission of the bankruptcy court before entering into negotiations with the bargaining representative of the employees would better accommodate the competing demands of the Act and the

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[9]There is no merit to petitioner's contention (Pet. 6) that the court of appeals' holding conflicts with this Court's holding in *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457 (1982). *Gibbons* involved the Rock Island Transition and Employee Assistance Act, 45 U.S.C. (Supp. V) 1001 *et seq.*, as amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1959 *et seq.* in which Congress imposed the duty on the bankrupt, Rock Island Railroad, to provide up to $75 million in benefits to displaced employees and accorded priority over all other creditors to the employees' claims. The Court held the statute invalid on the ground that it was repugnant to Article I, § 8, Cl. 4, of the Constitution, which requires uniformity in the enactment of bankruptcy laws. The Board's order in this case does not "legislate" expenditures of money nor require payment in disregard of the bankruptcy laws. Rather, the Board's make whole order is designed to dissipate the effects of petitioner's unfair labor practices. Petitioner's potential monetary liability has been established by and through the bankruptcy court in strict conformity with bankruptcy laws. See page 3 note 4, *supra*.

Code. But the dissent's concern that the trustee not make important decisions without the bankruptcy court's approval (*id.* at 90a) is fully met by the court of appeals' requirement that the bankruptcy court approve any agreement reached by the parties. Indeed, that solution may well give the bankruptcy court greater powers of supervision over the trustee's conduct than would a mere requirement that the trustee obtain approval before engaging in negotiations.

2. Petitioner contends also (Pet. 13-14) that the Board's back pay remedy is inappropriate because the employees were rightfully terminated. That contention overlooks the fact that, in fulfilling its obligations under Section 10(c) of the Act, 29 U.S.C. 160(c),[10] the Board must ensure that its remedial order not only deters the unfair labor practice found, but also "vindicate[s] the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952) (citation omitted). In order to "mak[e] the employees whole," the Board seeks to restore the parties, to the extent practicable, to the situation that would have obtained but for the unfair labor practice. See *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263, 265 (1969); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). In fact, "[t]he efficacy of the Board's remedies almost always depends upon the extent to which they can return the parties to a *status quo ante*." *NLRB* v. *Mastro Plastics Corp.*, 354 F.2d 170, 181 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). In cases involving an employer's breach of the duty to bargain, the primary remedial goal

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[10]Section 10(c) of the Act, 29 U.S.C. 160(c), provides that the Board, upon a finding that an unfair labor practice has been committed, "shall issue * * * an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *."

in restoring the status quo ante is to allow the union to resume bargaining in a meaningful context, without an unlawfully imposed deterioration in its bargaining position. See, *e.g.*, *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 215-217 (1964).

In situations in which it is impossible or inappropriate to order reopening of a closed operation, the Board has traditionally imposed, and the courts have approved, a limited make whole order of the sort issued in this case as a remedy for an employer's refusal to bargain about the effects of the discontinuance of operations on bargaining unit employees.[11] The Board's order in this case is designed to restore, so far as practicable, the bargaining power the Union would have had if petitioner had given timely notice of his decision and afforded the Union an opportunity to bargain about the effects of the decision before it was implemented. Moreover, as the court of appeals noted (Pet. App. 81a), the Board's remedy "create[s] an incentive for [petitioner] to bargain in good faith." See *Summit Tooling Co.*, 195 N.L.R.B. 479, 481 (1972), enforced mem., 474 F.2d 1352 (7th Cir. 1973).

Petitioner errs in asserting that these principles have no application to "ex-employees of a closed, bankrupt company" (Pet. 14) "where the Trustee has only limited powers and not the power to pay 'back pay' or even 'severance pay' " (*id.* at 13). If petitioner contends that the Board's

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[11]See, *e.g.*, *International Ladies' Garment Workers Union* v. *NLRB*, 463 F.2d 907, 921 (D.C. Cir. 1972); *Morrison Cafeterias Consolidated, Inc.* v. *NLRB*, 431 F.2d 254, 258 (8th Cir. 1970); *NLRB* v. *Drapery Mfg. Co.*, 425 F.2d 1026, 1028-1029 (8th Cir. 1970); *Globe Security Services, Inc.*, 229 N.L.R.B. 460, 462-463 (1977), enforced mem., 582 F.2d 1275 (3d Cir. 1978); *Empire Dental Co.*, 211 N.L.R.B. 860, 861 (1974), enforced mem., 538 F.2d 337 (9th Cir. 1976); *Burgmeyer Bros. Inc.*, 254 N.L.R.B. 1027, 1028-1029 & n.7. (1981); *Transmarine Navigation Corp.*, 170 N.L.R.B. 389, 390 (1968).

remedy is inappropriate because the employees have already been terminated, the law is clear that such termination does not defeat the Board's ability to impose an effective remedy for the unfair labor practice where an employer has unlawfully refused to bargain about the effects of a closing. See *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 681-682 (1981), and cases cited at note 11, *supra*. To the extent petitioner contends that he had no power to grant economic concessions, this contention merely restates his assertion that a trustee in bankruptcy has no obligation to bargain over the effects of a plant closing. As we have shown at pages 7-10, *supra*, that assertion is without merit.

3. Petitioner errs in contending (Pet. 10-13) that he was found guilty of a violation "neither charged, found nor litigated" (*id.* at 10).

The amended Board complaint explicitly states that petitioner terminated operations "without having afforded the Union an opportunity to negotiate and bargain concerning the effect of said conduct" and thereby violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. 6a). The administrative law judge specifically found (*id.* at 33a; emphasis omitted) that "Yorke failed to bargain with the Union about the shutdown's effect on employees even after it found out about the shutdown and made a written 'demand that an immediate meeting be set up so that we can discuss the . . . effects that your action has on our bargaining unit employees.' " In her conclusions of law (*id.* at 35a), the administrative law judge found that petitioner terminated operations and discharged employees "without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain concerning the effects of such conduct on unit employees" and that that conduct violated Section 8(a)(5) and (1) of the Act, 29

U.S.C. 158(a)(5) and (1).[12] Finally, the Board stated (Pet. App. 44a) that "the Administrative Law Judge properly found that [Seeburg] violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union regarding the effects on unit employees of its decision to terminate operations on February 11, 1980." Thus, the violation identified by the court of appeals properly rested on allegations and findings that were made at every point in the proceedings below.

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[12]Petitioner appears to read both this finding and the similar language in the complaint as referring only to his failure to give the Union *notice* of the decision to terminate operations. But the conjunction "and" adds the concurrent allegation and finding that there was a refusal "to negotiate and bargain concerning the effects [of the decision] on unit employees."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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National Labor Relations Board

JANUARY 1984

DOJ-1984-01

No. 83-810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE: NATHAN YORKE, TRUSTEE IN BANKRUPTCY, THE SEEBURG CORPORATION

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

WAREHOUSE, MAIL ORDER, OFFICE, PROFESSIONAL AND TECHNICAL EMPLOYEES UNION LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTERVENOR'S OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied the bargaining requirements and remedies of the National Labor Relations Act to the Trustee in bankruptcy?

2. Whether the Petitioner was properly notified of and given the opportunity to litigate the facts and theories on which liability was ultimately imposed?

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INTERVENOR'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 709 F. 2d 1138 (A. 70a-94a). The decision and order of the National Labor Relations Board is reported at 259 NLRB 819. (A. 41a-50a)

STATUTES INVOLVED

In addition to those statutes set forth in the Petition, also involved are Section 8(d), 29 U.S.C. § 158(c), and Section 10(c), 29 U.S.C. § 160(c), of the National Labor Relations Act, set forth in the Appendix hereto.

COUNTER-STATEMENT OF THE CASE

On February 4, 1980, Nathan Yorke was appointed by the Bankruptcy Court to act as Trustee in Bankruptcy for the estate of the Seeburg Corporation. The initial petition had sought reorganization under Chapter 11 of the Bankruptcy Act. At the time of the Trustee's appointment, there were approximately seven employees working who were represented by the Union. In the afternoon of the day of his appointment, Yorke paid a visit to the plant. On February 8, 1980, a first creditor's meeting was held. On February 11, 1980, the Bankruptcy Court issued an order authorizing the Trustee to curtail operations based upon a motion filed the same date by Yorke. On the same day that he filed the motion and that the order was granted, Yorke shut down the facility without giving any notice to the Union that such action was contemplated. (A. 22a-24a)

On February 15, 1980, the Union's attorney sent a letter to Yorke making certain inquiries and demanding "an immediate meeting be set up so that we can discuss the decision and effects that your action has had on our bargaining unit employees." (A. 25a) Yorke's reply, dated February 25, 1980, answered the questions but did not respond to the demand for a meeting. (A. 26a)

The Board's Administrative Law Judge concluded that Yorke's failure to give the Union prior notice of the closure was not justified, (A. 32a) and continued:

> In any event, Yorke failed to bargain with the Union about the shutdown's effect on employees even after it found out about the shutdown and

> made a written "demand that an immediate meeting be set up so that we can discuss the . . . effects that your action has on our bargaining unit employees." (A. 33a)

Among the acts which the Administrative Law Judge, the Board and the Court of Appeals found to have constituted this failure to bargain were Yorke's failure to respond to the request for the meeting, Yorke's acquiescence in his attorney's statement that there could be no give and take in bargaining, Yorke's insistence on a stenographic transcript of any bargaining sessions notwithstanding the Union's opposition and Yorke's statement in August of 1980 that he had no authority under the Bankruptcy Act to make severance payments. (A. 33a, 43a, 79a-80a)

In the bankruptcy proceedings, $55,000 was segregated by agreement of the bankrupt company, the Trustee, the creditors' committee and the purchaser to satisfy the potential claim arising from the National Labor Relations Board litigation. (A. 64a-66a) The plan of liquidation which was approved by the Bankruptcy Court included the sequestered amount. (A. 67a)

The Board's Administrative Law Judge concluded that the Trustee had violated the Act not only by failing to notify the Union of the decision before February 11, but also by his actions from February 15 through August. However, the Administrative Law Judge failed to order a back pay remedy. The Board upheld the findings of illegality but granted the limited back pay remedy set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). The Board's remedy requires only that the Trustee pay a minimum of two weeks' back pay to the employees who were on the payroll on the date when the plant was closed. The back pay stops running when the Trustee has bargained to agreement on subjects pertaining to the effects of the discontinuance of operations, a bona fide bargaining impasse has been reached or the Union fails either to request bargaining or to bargain in good faith. (A. 47a) Contrary to the assertion of the Trustee, (Pet. 4) the

Board's order does not continue until agreement or impasse is reached on a "collective bargaining agreement."

The Court of Appeals found that a true emergency had existed between February 4 and 11, justifying the Trustee's failure to give notice to the Union prior to the shutdown. However, the Court of Appeals found no justification for the subsequent failure of the Trustee to bargain with the Union and enforced the Board's *Transmarine* remedy, except that the Court provided for prospective effect only. (A. 78a-79a, 81a-84a)

REASONS FOR DENYING THE WRIT

I. This Case Presents No Conflict Between The Bankruptcy Act and The National Labor Relations Act.

The Petitioner does not assert that any issues presented in this case implicate the issues presently before this Court in *Bildisco*, 682 F.2d 72 (3d Cir. 1982), cert. granted, 74 L. Ed. 2d 992 (1/17/83). There is no issue here as to a Trustee's right to reject an executory agreement. All that is involved here is the Trustee's obligation to "meet at reasonable times and confer in good faith", 29 U.S.C. Sec. 158(d), concerning the effects on the employees of the decision to shut down operations. See *First National Maintenance Corp.* v. *N.L.R.B.*, 452 U.S. 666, 677 fn. 15, 681-682, (1982).

Nor does any conflict between the two statutes appear anywhere but in the argument of the Trustee. Yorke does not allege that he is immune from the reach of the National Labor Relations Act. (See Pet. 8) Rather, he claims that there is a "conflict between the Board's demands and the Trustee's duty" which should be resolved in the first instance in the Bankruptcy Court. (Pet. 9) There is no such conflict. The Board's demands are only that the Trustee bargain about the effects of plant closure. The Trustee's duty is to abide not only by the Bankruptcy Act, but also by the National Labor Relations Act, a point conceded by Yorke. (Pet. 8) That duty includes bargaining with a Union upon request concerning

the effects of his decision to shut down operations. Thus, the Board's demands and the Trustee's duty are the same.

The Petitioner, in colorful language, sets up straw men. He contends that he is not required to continue operations except as an aid to liquidating the estate. (Pet. 8) The Court did not require him to continue operations; the Court required him only to bargain with the Union about the effects of the discontinuance of operations after the plant had shut down. He asserts further that he is not to play the role of "Lady Bountiful at the expense of creditors." (Pet. 8) He ignores the quoted portion of *In re Brada Miller Freight System*, 702 F.2d 890, 897 (11th Cir. 1983) that the critical interests in a bankruptcy proceeding include not only creditors, but also shareholders and employees. (See Pet. 9) Certainly, where, as here, there has been a judgment on behalf of those employees, they become creditors as much as anyone else. Even before judgment, their interests are "critical." *Brada Miller Freight System, supra.*

What the Petitioner refers to as the Board's "demands" is in reality the Board's remedy, as modified by the Court. Yet, interestingly enough, the Petitioner apparently abandons his "penalty" theory by conceding a "rationale" for a *Transmarine* remedy. (Pet. 14) He argues only, again for irrelevant reasons, that the rationale does not apply to this case. The application of a justified remedy to a particular fact situation hardly calls for the exercise of this Court's extraordinary writ.

Moreover, the Board, pursuant to Section 10(c) of the Act, has broad remedial powers and the Courts have usually approved the *Transmarine* remedy, as did the Court here.

Nothing in the Court's order requires the exhaustion of the $55,000 which has been set aside, contrary to Petitioner's assertions. (Pet. 14) Yorke could have kept the back pay to a minimum simply by doing what the Board and the Courts have required, namely, immediately bargain with the Union concerning the effects of the plant closure until agreement or impasse had been reached.

The remaining straw men set up in the Petition are even more extraordinary. It is asserted that there were no "victims" of the Trustee's unfair labor practices. (Pet. 13) Surely, the affected employees who did not have the benefit of bargaining for severance pay, reinstatement rights, seniority in the event of recall, etc., were no less than such "victims." Yorke also misspeaks when he asserts that he had no power to pay "back pay" or "severance pay." (Pet. 13) He may not have had the power to agree to pay those amounts without Court order, but he surely had the power to bargain about them and to seek Court authorization. Yorke also seems to claim that such items as severance pay, reinstatement rights, seniority for recall, etc., are not "conditions of employment" and therefore, not mandatory subjects of bargaining. (Pet. 13-14) First, this argument has never been raised below and therefore is not appropriate for consideration now. Second, this Court has held that bargaining about the effects of a shutdown are mandatory subjects of bargaining. *First National Maintenance Corp.* v. *NLRB, supra.*

Accordingly, this case does not present any conflict between the application of the Bankruptcy Act and the National Labor Relations Act which requires this Court's writ.

II. Petitioner Was Fully Advised Of, And Litigated, The Grounds On Which Liability Was Premised.

While the Court of Appeals found that the emergency which existed between February 4 and February 11 justified the Trustee's failure to notify the Union in advance of his decision to close, the Court found that the subsequent refusal to bargain was not justified by any emergency or other conditions.

Yorke contends that he was never put on notice that his acts subsequent to February 15 were being contested. This is remarkable. First, the Amended Complaint sets forth that the Trustee terminated operations "without prior notice to the Union *and* without having afforded the Union an opportunity to negotiate and bargain concerning the effect of said

conduct." (A. 6a) As the Court of Appeals properly found, two premises are set forth in the quoted portion of the Amended Complaint, the absence of prior notice and refusing the Union an opportunity to bargain thereafter. Second, if that was not clear enough, the matter of the Trustee's conduct subsequent to the Union's demand of February 15 was fully litigated. (A. 25a-34a) It does not appear that Yorke objected at any time before the Administrative Law Judge, before the Board or before the Court of Appeals, prior to his petition to the Court for rehearing, that he had not properly been put on notice of the issues which he litigated. Thus, even if the complaint itself did not put the Trustee on notice, he was certainly on notice at the time that he litigated the issues. Third, as noted, he had never raised the issue in a timely fashion and this Court should not pass upon it.

Accordingly, there is no absence of due process in this case requiring the granting of a writ.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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APPENDIX
NATIONAL LABOR RELATIONS ACT, AS AMENDED

Section 8

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:. . . .

Section 10

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him:. . . .

No. 83-810

IN THE

Supreme Court of the United States

IN RE:

NATHAN YORKE, TRUSTEE IN BANKRUPTCY, THE SEEBURG CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

WAREHOUSE, MAIL ORDER, OFFICE, PROFESSIONAL AND TECHNICAL EMPLOYEES UNION LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervening-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEFS OF THE NATIONAL LABOR RELATIONS BOARD AND INTERVENOR

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A.

The Board and the Union unite in avoiding the substance of Petitioner's position with abstractions and obscuration.[1] If either had the candor to admit it, this case is about the funds now held in the bankruptcy court for the benefit of creditors and the claims of the union to these funds. In both briefs, truth is the victim of zeal.

The Union's claim is bottomed in a premise alien to the framework of the Bankruptcy Act which does not permit payment to those who have toiled not, nor spun, nor otherwise given value to the estate. The framework of the Bankruptcy Act does not provide for payments of the penal nature here attempted to be assessed.

If, in fact, the case is about those funds then the command to make a limited payment therefrom and to bargain about the remainder does create a conflict situation for the Trustee whose duty is to the creditors of the estate. This conflict was resolved here in terms solely of the Board's fiat. The Board rightfully attempts to mask its claim by burying it in a footnote (page 9) saying that the liability "has been established *** in strict conformity with bankruptcy law." All that was established was that the price of approval of a plan of liquidation was the sequestration of a fund to cover a meretricious claim.

B.

The Board defends its remedial order (Reply p. 10) as a vindication of the "public policy of the statute by making the employees whole for losses suffered on account of an unfair

[1] The suggestions as bargaining topics in both briefs with reference to "severance pay, reinstatement rights, seniority in the event of recall" (Union Reply p. 6) and "severance pay, payments into a pension fund, preferential hiring at an employer's other locations, and provision of reference letters" (Board Reply p. 8) are not vindicated anywhere in this record. No reference letters were ever requested.

labor practice," *Nathanson* v. *National Labor Relations Board,* 344 U. S. 25, 27 (1952) and restoration of the parties to a *status quo ante, National Labor Relations Board* v. *J. H. Rutter-Rex Mfg. Co.,* 396 U. S. 258; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177 (1945); and *National Labor Relations Board* v. *Mastro Plastics Company,* 354 F. 2d 170 (2d Cir. 1965), cert. denied, 384 U. S. 972 (1966). A Latin quote is appropriate for a dead enterprise but is singularly inapplicable where, as here, the Court has found that the Trustee had every right under these circumstances to close the plant. Whatever merit the remedy may have where the closing itself was wrongful or secretive, it has no merit here where the Court found the closing proper and that the Trustee had no duty under the circumstances he found to notify and bargain with the Union. No *status quo ante* to which the policy could apply is present here.

C.

The Board and the Union apparently concede that if the amended complaint did not adequately apprise the Trustee of just what he was charged with then the Trustee has been denied due process. Both take the position that the Trustee was notified by the amended complaint. Both present a bob-tailed version of the charges in that complaint.

Even rhetoric should be held to some ethical standard. A minimal regard for such criteria condemns the calculated omission which, in this context, totally misrepresents the charges of the amended complaint. The omission speaks eloquently of the merits of their positions.

The Union (Reply p. 6) begins its quotation from the amended complaint in mid-sentence, "without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain concerning the effect of said conduct." The Board's quote also starts out in mid-air, "without

having afforded the Union an opportunity to negotiate and bargain, concerning the effect of said conduct." (Reply p. 12). The full context is as follows:

> "(a) On or about February 8, 1980, Respondents terminated operations at its facility in Chicago, Illinois and discharged its employees.
>
> (b) Respondents engaged in the acts and conduct described above in paragraph XI(a) without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain concerning the effect of said conduct."

The Trustee was, of course, charged with a specific violation on a specific day, i.e., terminating its operation on or about February 8, 1980, and discharging its employees. The Administrative Law Judge, in her formal findings and the Board in its turn simply repeated this. (A 35). The Trustee was not charged with a failure to bargain in the wake of the closing at a subsequent time. Her gratuitous inclusion of another refusal to bargain in her narrative was a bulwark to the specific finding, not an additional conviction of illegal conduct. If so treated, it was in violation of her ruling that subsequent events would only go to the remedy with respect to the specific alleged charge. The Union insists that the "issues" were litigated. The lick and brush treatment of evidence going only to the remedy which counsel believed was inappropriate hardly qualifies as the type of issue resolution conforming with due process. The Trustee has been ill-treated in this regard. Finally, the pettifogging suggestion, that this issue is raised here for the first time and, so, should be disregarded, makes the Trustee's point. The only issue litigated and argued was whether or not on February 8, 1980, an unfair labor practice was committed. *Only after* the Court of Appeals absolution of the Trustee on that offense and *only after* that Court contrived to find another unfair labor practice could and did this become an issue.

CONCLUSION

Simply being "had" is not among the considerations governing this Court's review on certiorari unless it is within the broad scope of this Court's Rule 17.1.(a). The Trustee was "had" here and, thereby, the creditors of the estate. Certiorari should be granted to redress the wrong.

Respectfully submitted,

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